No. 99-409-CFX Title: Hartford Underwriters Insurance Company, Petitioner
v.
Union Planters Bank, N.A.

Docketed: September 8, 1999 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Sep 3 1999	Petition for writ of certiorari filed. (Response due October 8, 1999)
	Oct 8 1999	Brief amicus curiae of American Insurance Association filed.
	Oct 8 1999	Brief of respondent Union Planters National Bank in opposition filed.
	Oct 20 1999	DISTRIBUTED. November 5, 1999
	Nov 8 1999	Petition GRANTED.
		SET FOR ARGUMENT March 20, 2000.
		**********
	Dec 22 1999	Brief amici curiae of American Insurance Association, et al. filed.
	Dec 23 1999	Joint appendix filed.
	Dec 23 1999	Brief of petitioner Hartford Underwriters Insurance Company filed.
	Jan 19 2000	Record filed.
	Jan 26 2000	CIRCULATED.
	Jan 26 2000	Brief of respondent Union Planters National Bank filed.
	Jan 26 2000	Brief amicus curiae of Commercial Finance Association filed.
	Feb 11 2000	Application (99A653) for leave to file petitioner's reply brief on the merits in excess of the page limitation., submitted to Justice Thomas.
	Feb 17 2000	Application (99A653) denied by Justice Thomas.
	Feb 25 2000	Reply brief of petitioner Hartford Underwriters Insurance Company filed.
	Mar 20 2000	ARGUED.

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Supreme Court, U.S.
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'99 409 SEP 3 1999

No.

IN THE

Supreme Court of the United States

HARTFORD UNDERWRITERS
INSURANCE COMPANY,

Petitioner,

v.

MAGNA BANK, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a postpetition administrative creditor in a bankruptcy case have standing under 11 U.S.C. § 506(c) to seek payment of its administrative claim from property of the bankruptcy estate that is encumbered by a secured creditor's lien?

STATEMENT PURSUANT TO RULE 29.6

Hartford Fire Insurance Company (the "Parent") owns 100% of the Petitioner's stock. The Parent is not publicly held. The Parent is an indirect subsidiary of The Hartford Financial Services Group, Inc., which is a publicly held company. In addition, the Parent is an affiliate of Hartford Life Insurance Company, which has issued shares to the public.

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Petitioner, Hartford Underwriters Insurance Company ("Hartford"), respectfully requests that the Court grant a Writ of Certiorari to review the *en banc* decision of the United States Court of Appeals for the Eighth Circuit.

DECISIONS BELOW

The unreported decision of the Bankruptcy Court determining that Hartford has standing under 11 U.S.C. § 506(c) to recover its administrative claim from property of the debtor's bankruptcy estate is reprinted in the attached Appendix at App. 45a-59a. The unreported decision of the District Court affirming the Bankruptcy Court is reprinted in the attached Appendix at App. 32a-44a. The panel decision of the United States Court of Appeals for the Eighth Circuit affirming the District Court is reported at 150 F.3d 868 (8th Cir. 1998) and is reprinted in the attached Appendix at App. 21a-31a. The *en banc* decision of the United States Court of Appeals for the Eighth Circuit determining that Hartford lacks standing under 11 U.S.C. § 506(c) is reported at 177 F.3d 719 (8th Cir. 1999) and is reprinted in the attached Appendix at App. 1a-20a. The sole issue decided by the *en banc* Court of Appeals is Hartford's standing under section 506(c).

STATEMENT OF JURISDICTION

The *en banc* decision of the Court of Appeals for the Eighth Circuit was decided on June 7, 1999. This Court has jurisdiction to grant review of this matter by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutes involved in this case, 11 U.S.C. § 503 (permitting an administrative claimant to pursue an administrative claim against a debtor's bankruptcy estate), 11 U.S.C. § 506(c) (permitting the recovery of certain postpetition claims from property of a bankruptcy estate that is encumbered by a secured creditor's lien), and 11 U.S.C. § 1109(b) (permitting any party in interest in a bankruptcy case, including any creditor, to raise, appear and be heard on any issue in the case), are reproduced in the attached Appendix at App. 60a-64a.

BASIS OF FEDERAL JURISDICTION

Jurisdiction in the Bankruptcy Court was invoked pursuant to 28 U.S.C. §§ 157 & 1334. Jurisdiction in the District Court was invoked pursuant to 28 U.S.C. § 158(a). Jurisdiction in the Court of Appeals was invoked pursuant to 28 U.S.C. §§ 158(d) & 1291.

STATEMENT OF THE CASE

This matter arises out of the chapter 11 bankruptcy proceedings of Hen House Interstate, Inc. (the "Debtor"). Both before and after the Debtor commenced its bankruptcy case, it operated a number of businesses, including service stations, restaurants, gift stores, and an outdoor advertising firm. Petitioner Hartford Underwriters Insurance Company ("Hartford") supplied workers' compensation insurance to the Debtor during the first year of its bankruptcy proceedings. The instant controversy involves the question of whether Hartford has standing under section 506(c) of the Bankruptcy

Code to recover its administrative claim for unpaid insurance premiums from property of the Debtor's bankruptcy estate that is encumbered by a secured party's lien.

Before the Debtor filed for bankruptcy relief, respondent Magna Bank, N.A. ("Magna") was the Debtor's primary lender, holding a lien on all of the Debtor's real and personal property. After the Debtor commenced its case, it sought approval from the bankruptcy court to borrow additional funds from Magna, and also to pay certain administrative claims incurred during the course of the reorganization proceedings.[1] Magna consented to the financing, and also to the use of its collateral to pay certain of the Debtor's necessary administrative expenses. Subsequently, the Bankruptcy Court entered an order authorizing the financing, and likewise entered an order authorizing and directing the Debtor to pay its necessary operating expenses from Magna's collateral. The authorized expenses included the insurance premiums owed to Hartford. Notwithstanding this order, the Debtor failed to pay in full the premiums due Hartford.

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1. During the course of a chapter 11 bankruptcy case, the debtor typically remains in possession of its property as it attempts to reorganize. *See* 11 U.S.C. § 1101(a) (defining the term "debtor in possession" to mean the debtor), § 1107 (prescribing rights, powers and duties of a debtor in possession in a chapter 11 case), and § 1108 (authorizing the debtor in possession to continue to operate its business in a chapter 11 case). A trustee may be appointed in a chapter 11 case for "cause." *See* 11 U.S.C. § 1104(a). No trustee was appointed during the course of the Debtor's chapter 11 case. As discussed below, however, a chapter 7 trustee was appointed after the Debtor's chapter 11 case was converted to a case under chapter 7. *See* 11 U.S.C. § 702 (providing for the selection of a chapter 7 trustee in a chapter 7 case).

The Debtor's attempt to rehabilitate its businesses was not successful, and after a year in chapter 11, the Debtor's case was converted to a liquidation proceeding under chapter 7, at which time a chapter 7 trustee was appointed. Before the conversion, however, the Debtor was able to sell a number of its properties as going concerns, and Magna received the proceeds of these sales. It is undisputed that, without Hartford's provision of workers' compensation insurance, the Debtor could not have continued to operate.

Hartford commenced the underlying litigation in the Bankruptcy Court to recover its claim for unpaid postpetition insurance premiums from the Debtor's estate. Hartford sought relief pursuant to 11 U.S.C. § 503(b), which expressly provides for the allowance of administrative claims against an estate in bankruptcy. Because all of the estate's property (including all available cash) was encumbered by Magna's lien, Hartford also sought relief pursuant to 11 U.S.C. § 506(c), which expressly provides for the payment of allowed administrative claims from a secured creditor's collateral to the extent that the incurrence of the expense provided a benefit to the secured party.

The Bankruptcy Court allowed Hartford's claim under section 503(b), and likewise ruled that Hartford could recover payment from property encumbered by Magna's lien under section 506(c). In reaching its decision, the Bankruptcy Court relied on *United States, IRS v. Boatmen's First National Bank*, 5 F.3d 1157 (8th Cir. 1993), a prior Eighth Circuit decision holding that the United States had standing to pursue an administrative tax claim under section 506(c). (App. at 51a-55a.) On appeal, the District Court affirmed. (App. at 44a.)

On further appeal, a three-judge panel of the Eighth Circuit followed *Boatmen's*, and also affirmed on the standing question. *See Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 150 F.3d 868, 871 (8th Cir. 1998) (hereinafter, the "Panel Decision") (the Panel Decision is reprinted in the attached Appendix at App. 21a-31a). Subsequently, the Court of Appeals granted rehearing *en banc* limited to the issue of standing. In a split 6-5 decision, the *en banc* court expressly overruled *Boatmen's* and held that Hartford lacks standing to pursue its claim under section 506(c). *See Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 177 F.3d 719, 721 & 725 (8th Cir. 1999) (hereinafter, the "En Banc Decision") (the En Banc Decision is reprinted in the attached Appendix at App. 1a-20a). The court concluded that only a trustee (or debtor in a chapter 11 case) has standing to recover payment of an unpaid administrative claim from a secured creditor's collateral under this section. In reaching this conclusion, the court expressly recognized that the various Courts of Appeals are split on the standing issue. *See id.* at 723 (App. at 8a).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS RENDERED A DECISION THAT DEEPENS AN EXISTING CONFLICT AMONG THE COURTS OF APPEALS ON THE ISSUE OF WHETHER AN ADMINISTRATIVE CLAIMANT HAS STANDING TO PURSUE PAYMENT OF ITS CLAIM UNDER 11 U.S.C. § 506(c).

The decision below denying Hartford standing under section 506(c) deepens an existing conflict among the six United States Courts of Appeals that have decided this issue. Moreover, by advocating the minority view, the decision below has only worsened the disarray among the Circuits, which are now split 4-2 on the standing question.[2] As the Eighth Circuit specifically noted in the En Banc Decision, "Hartford correctly points out that our conclusion here is not the consensus of the circuits that have considered the issue." *In re Hen House Interstate, Inc.*, 177 F.3d at 723 (App. at 8a).

Section 506(c) provides that "[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expense of preserving, or disposing of, such property to the extent of any benefit to the holder of [the secured] claim." 11 U.S.C. § 506(c). In addressing the standing of administrative claimants to pursue recovery under this section, the Courts of Appeals have

2. Mirroring the split in the Circuits, the individual judges below were similarly divided (6-5) on whether Hartford had standing under section 506(c).

embraced two irreconcilable interpretations. In the majority, four Courts of Appeals have concluded that the section should not be read as though it provided that "only" trustees may pursue relief under its terms, and have expressly held that unpaid administrative claimants have standing to recover payment. *See Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995); *North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229, 232 (9th Cir. 1991), *cert. denied*, 506 U.S. 821 (1992); *In re Parque Forestal, Inc.*, 949 F.2d 504, 511-12 (1st Cir. 1991); *New Orleans Pub. Serv., Inc. v. First Fed. Sav. & Loan Ass'n (In re Delta Towers, Ltd.)*, 924 F.2d 74, 77 (5th Cir. 1991); *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91, 94 (3d Cir. 1986). This majority view prevailed in the Eighth Circuit until the En Banc Decision. *See United States, IRS v. Boatmen's First Nat'l Bank*, 5 F.3d 1157 (8th Cir. 1993), *overruled by In re Hen House Interstate, Inc.*, 177 F.3d at 721 (App. at 12a).

The minority view among the circuit courts — first articulated by the United States Court of Appeals for the Fourth Circuit — construes section 506(c) as though it stated that "only" a trustee may pursue relief under its terms, holding that administrative claimants are without standing to pursue recovery of their claims. *See Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 484 (4th Cir. 1994). *See also Loudoun Leasing Dev. Co. v. Ford Motor Credit Co. (In re K & L Lakeland, Inc.)*, 128 F.3d 203, 206 (4th Cir. 1997). The *en banc* ruling in the court below adopts this minority position.

This Court should resolve the conflict among the Courts of Appeals to prevent further inconsistency on the issue of the standing of administrative creditors under section 506(c). The current disarray in the case law has sowed confusion and controversy, particularly among the district and bankruptcy courts. *Compare Cavender v. Ameritrust Co., N.A. (In re Opti-Gage, Inc.)*, 124 B.R. 515, 518 (Bankr. S.D. Ohio 1991) (recognizing the standing of an administrative claimant to recover its claim from a secured creditor's collateral under section 506(c)), *with Williams v. Bank One Cleveland, NA (In re Dyac Corp.)*, 164 B.R. 574, 581 (N.D. Ohio 1994) (holding that only a trustee can recover under section 506(c)); *compare In re Oakland Care Ctr., Inc.*, 142 B.R. 791, 796 (E.D. Mich. 1992) (holding that only a trustee has standing under section 506(c)), *and Dock's Corner Assocs. v. Boyd (In re Great Northern Forest Prods., Inc.)*, 135 B.R. 46, 64-66 (Bankr. W.D. Mich. 1991) (same), *with McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (W.D. Mich. 1991) (adopting the majority view and concluding that parties other than trustees have standing); *compare Shaw, Licitra, Parente, Esernio & Schwarz, P.C. v. Travelers Indem. Co. (In re Grant Assocs.)*, 154 B.R. 836, 841 (S.D.N.Y. 1993) (concluding that an administrative creditor has standing under 506(c)), *and In re Croton River Club, Inc.*, 162 B.R. 656, 663-64 (Bankr. S.D.N.Y. 1993) (same), *with In re Crescenzi*, 1995 WL 753906 at *5 (S.D.N.Y. Dec. 19, 1995) (acknowledging the majority view but concluding that that the appellant's claim under section 506(c) was improper for lack of standing). *See also In re Bluffton Castings Corp.*, 224 B.R. 902, 903 (Bankr. N.D. Ind. 1998) (holding that the claimants, who were not trustees, lacked standing under section 506(c)); *In re Scopetta-Senra Partnership III*, 129 B.R. 700, 701 (Bankr. S.D. Fla. 1991) (concluding that parties other than trustees

have standing under section 506(c)).[3] Moreover, permitting this conflict to continue is not likely to provide additional insight into how the standing question should be resolved. Six Courts of Appeals (and innumerable lower courts) have already explored extensively the relevant issues,[4] and the split vote of the judges of the court below further attests to the issue's divisiveness. In order to avoid additional conflict and needless litigation, the Court should grant the Writ to resolve the split of authority at this time.

II.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH ESTABLISHED PRECEDENTS OF THIS COURT GOVERNING THE DETERMINATION OF A PARTY'S STANDING TO PURSUE STATUTORY RELIEF.

As pointed out by the five dissenting judges of the *en banc* court, the majority opinion fails to apply the relevant precedents of this Court establishing the correct method for

3. There are numerous additional district and bankruptcy court citations. *See In re Great Northern Forest Prods., Inc.*, 135 B.R. at 62-63 (listing additional cases); 4 Lawrence P. King, *et al.*, *Collier on Bankruptcy*, ¶ 506.05[8] at 506-141-143 nn.46-48 (15th ed. rev. 1999) (same).

4. In addition, the issue has generated substantial scholarly commentary. *See* Justin T. Toth, *Rehabilitating Bankruptcy Code Section 506(c): Should Third Party Claimants Have Independent Standing?*, 16 W. New Eng. L. Rev. 1 (1994) (analyzing the standing issue, including the split of authority among the courts); Barry L. Zaretsky, *Standing To Recover Costs, Expenses from Collateral*, 212 N.Y.L.J. 3 (July 21, 1994) (same).

determining a party's standing to pursue relief under a federal statutory scheme. As this Court has held, standing to pursue relief under a federal statutory scheme must be determined in accordance with "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (cited in *In re Hen House Interstate, Inc.*, 177 F.3d at 726 (Heaney, J., dissenting)). *See also Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Data Processing Serv. v. Camp*, 397 U.S. 150, 153 (1970). First, on the constitutional side of the analysis, the claimant must satisfy the case and controversy requirement of Article III. *See Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 663-664 (1993). *See also Bennett v. Spear*, 520 U.S. at 162; *Flast v. Cohen*, 392 U.S. 83, 101 (1968). Second, the claimant must satisfy the relevant prudential standing requirement; such as, for example, whether the interest that the party in question seeks to vindicate arguably lies within the "zone of interests" sought to be protected or regulated by the particular statutory scheme in question. *See Bennett v. Spear*, 520 U.S. at 162; *Data Processing Serv. v. Camp*, 397 U.S. at 153.

Here, the majority of the Eighth Circuit ignored both aspects of this two-part test in concluding that Hartford lacks standing to recover its claim under section 506(c).[5] *See In re Hen House Interstate, Inc.*, 177 F.3d at 722-24

5. As explained by the dissenting judges in the court below, and more fully above, Hartford has standing under both Article III and the prudential standing requirement to assert its section 506(c) claim because Hartford has a clear economic interest in obtaining payment of its claim, and its interest falls within the zone of interests sought to be protected by the statute. *See In re Hen House Interstate, Inc.*, 177 F.3d at 726-27 (Heaney, J., dissenting).

(App. 5a-12a). Instead of applying this test, the court below simply ruled that section 506(c) does not expressly list administrative claimants as parties with standing under its terms, and, therefore, that administrative claimants must be excluded from the statute's scope. In essence, the court ruled that, unless a particular party is identified *expressly* in a bankruptcy statute as having standing to pursue relief under the statute's provisions, then that party is presumptively prohibited from doing so, even though no express prohibition can be found in the statutory text. As this Court has ruled, however, the zone of interests test adopts precisely the opposite approach. Specifically, although the breadth of the test may vary "according to the provisions of the law at issue," *Bennett*, 520 U.S. at 163, the test "is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987). *See also National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 118 S. Ct. 927, 935 (1998).

As this Court held unanimously in *Bennett*, "Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated." *Bennett v. Spear*, 520 U.S. at 163. As is relevant here, nothing in the Bankruptcy Code purports to negate application of the zone of interests test in the context of applying section 506(c). On the contrary, other provisions of the Bankruptcy Code codify the zone of interests approach as a rule of general applicability in bankruptcy proceedings.

Most significantly, section 1109(b) expressly provides that "[a] party in interest, including . . . a creditor, . . . may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b) (a copy of section

1109(b) is reprinted in the attached Appendix at App. 64a). As explained in the leading treatise on bankruptcy law: "In any particular chapter 11 matter involving a section of the Code, at least two statutes bearing on standing always apply: the particular substantive statute involved *and* section 1109(b)." 7 Lawrence P. King, *et al., Collier on Bankruptcy*, ¶ 1109.04[4][b][i] at 1109-43 (15th ed. rev. 1999) (citations omitted). Moreover, as explained by the Court of Appeals for the Seventh Circuit, section 1109(b) means that

> anyone who has a legally protected interest that could be affected by a bankruptcy proceeding is entitled to assert that interest with respect to any issue to which it pertains, thus making explicit what is implicit in an *in rem* proceeding — that everyone with a claim to the *res* has a right to be heard before the *res* is disposed of since that disposition will extinguish all such claims.

In re James Wilson Assocs., 965 F.2d 160, 169 (7th Cir. 1992).

Section 506(c) governs the payment of an administrative expense from property of a debtor's bankruptcy estate if the property in question is encumbered by a lien in favor of a secured party. Before the relevant collateral is disposed of, and the proceeds turned over to the secured creditor, the unpaid administrative claimant has an interest, covered by section 506(c), in having its claim paid from that property. *See* 4 Lawrence P. King, *et al., Collier on Bankruptcy*, ¶ 506.05[1] at 506-126 (15th ed. rev. 1999) (discussing the purpose of section 506(c)). In concluding that Hartford lacks standing to pursue relief under section 506(c), the majority of the *en banc* court crafted a new rule of standing that effectively ignores Hartford's interest, overlooks this Court's

standing precedents, and misperceives the express standing rules codified in section 1109(b).[6]

The rule adopted by the *en banc* court is an unfortunate precedent. In the bankruptcy context, a party's ability to participate in the process and vindicate its own interests is essential to the successful operation of the current statutory scheme, and also to ensure that the party's interests are protected. Few issues in bankruptcy are more important than a creditor's right of participation. As this Court has recently explained, in enacting the reorganization provisions of the Bankruptcy Code, "Congress adopted the view that creditors . . . are very often better judges of . . . their own economic self-interest than courts, trustees, or [governmental agencies]." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411, 1424 n.28 (1999) (citation and quotation marks omitted). Indeed, implicit in the bankruptcy process as a whole, and explicit in the text of section 1109(b), is the unmistakable preference that creditors should have the right to champion their own interests on their own behalf. In this instance, the court below adopted and applied a restrictive standing analysis at odds with this recognized principle. Because the lower court's ruling also conflicts with the Court's standing precedents, and misconstrues an important provision of federal bankruptcy law, the ruling should be reviewed at this time.

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6. Among other things, the *en banc* court dismissed the relevance of section 1109(b) with the observation that the Debtor's bankruptcy case had been converted from a chapter 11 proceeding to a proceeding under chapter 7, and, thus, that section 1109(b) was no longer germane. *In re Hen House Interstate, Inc.*, 177 F.3d at 722 n.3. The essential point remains, however, that, regardless of the conversion of the Debtor's case from one chapter to another, this Court's prudential standing doctrine still applies, and there is nothing in the Bankruptcy Code that purports to negate its application here.

III.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT REQUIRING THAT SECTION 506 OF THE BANKRUPTCY CODE BE CONSTRUED IN A MANNER CONSISTENT WITH OTHER APPLICABLE PROVISIONS OF THE CODE.

As this Court has observed repeatedly, the Bankruptcy Code, like other statutory schemes, should be construed as a whole, and not as a collection of unrelated provisions. *See United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (construing sections 361, 362, and 506 of the Bankruptcy Code, and observing that "[s]tatutory construction . . . is a holistic endeavor"); *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 218 (1936) (stating that "[t]o fix the meaning of these provisions [of the Bankruptcy Act] there is a need to keep in view the background of their history. There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts."). *See also United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (stating that "[o]ver and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and to its object and policy.' ") (citation omitted). The court below, however, violated this well-established principle by construing section 506(c) virtually in a statutory vacuum.

Among other things, section 506(c) should be construed in conjunction with section 503(a). Section 503(a) authorizes "[a]n entity [to] file a request for payment of an

administrative expense. . . ." 11 U.S.C. § 503(a) (a copy of section 503(a) is reprinted in the attached Appendix at App. 60a-62a). Moreover, the legislative history to section 503(a) likewise establishes that an administrative claimant has standing to pursue its own administrative claim on its own behalf. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 355 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 66 (1978) (stating that a creditor may file its own administrative claim).

As is relevant here, section 503 specifies the kinds of expenses that may be recovered from a bankruptcy estate on a priority basis as a proper postpetition administrative claim. *See* 11 U.S.C. § 507(a) (specifying the priority of administrative claims). In turn, section 506(c) specifies the kinds of administrative expenses that may be recovered from estate property that is encumbered by a lien. Section 506(c) does not provide a cause of action against the secured creditor; it merely explains how encumbered property of the bankruptcy estate is to be distributed among the various claimants, including the secured party. In other words, section 506(c) is nothing more than a priority provision. It makes no sense to conclude that an administrative claimant has standing to pursue its own claim against the bankruptcy estate under section 503(a), but not the claim's priority under section 506(c), and must rely on a bankruptcy trustee (or debtor in a chapter 11 case) to do so.

More important, as explained previously, section 1109(b) confers express rights of standing on parties in interest, including creditors. *See* 11 U.S.C. § 1109(b) (App. 64a). As explained in the legislative history, section 1109(b) provides "in unqualified terms, that any creditor . . . shall have the right to be heard as a party in interest under this

chapter in person, by an attorney, or by a committee." S. Rep. No. 989, 95th Cong., 2d Sess. 116 (1978). *See also* 124 Cong. Rec. H11,102 (daily ed. Sept. 28, 1978). As the existence of section 1109(b) makes plain, no individual provision of the Bankruptcy Code is necessarily its own arbiter of standing. Rather, the existence of provisions like section 1109(b) demonstrates that the Code relies for its operation on general standing principles of broad application, obviating the need to enumerate repetitively in each statutory section the precise parties that may pursue relief under the terms of that section.

Moreover, consistent with the Code's general principles of standing, in situations in which Congress intends to prevent a party from seeking relief under a particular provision of the Code, it affirmatively and expressly *excludes* that party from the scope of the particular statute.

For example, section 707(b) governs who may request dismissal of a chapter 7 case for "substantial abuse." Significantly, section 707(b) does not simply authorize certain parties to pursue relief under this provision as a means to identify the parties with standing. On the contrary, it expressly provides that relief under the section may be sought by "the court, on its own motion or on a motion by the United States trustee, *but not at the request or suggestion of any party in interest.*" 11 U.S.C. § 707(b) (emphasis added).

Similarly, in defining who may be a debtor under the various chapters of the Bankruptcy Code, the various subsections of section 109 are quite specific in delimiting the persons with and without the requisite standing. For example, section 109(a) provides that "*only* a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this

title." 11 U.S.C. § 109(a) (emphasis added). Likewise, section 109(d) provides that "[*o*]*nly* a person that may be a debtor under chapter 7 of this title, *except* a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title." 11 U.S.C. § 109(d) (emphasis added). *See also* 11 U.S.C. § 303(a) (stating that the section applies "only" against certain persons, and not others), § 307 (providing that the United States trustee may raise, appear and be heard on any issue "but may not file a plan"), § 341(c) (directing that the court "may not preside at, and may not attend" a meeting of creditors), § 702(a) (specifying that "only" certain creditors may vote for a trustee), § 706(c) (expressly limiting relief under the section to the debtor), § 1109(a) (expressly limiting the standing of the Securities and Exchange Commission to take an appeal), § 1112(c) (expressly limiting relief under the section to the debtor), § 1112(d) (same), § 1121(b) (providing that "only" the debtor may file a plan for a prescribed period of time), § 1121(e) (same), § 1164 (providing that certain governmental agencies may raise issues and appear and be heard, but may not take an appeal), § 1303 (specifying certain rights of the debtor "exclusive" of the trustee), § 1304(b) (same), § 1307(c)(9) (prescribing that "only" the United States trustee may request certain relief), and § 1307(c)(10) (same).

As the numerous examples cited above make clear, when Congress intends to limit who may pursue relief under a particular chapter or section of the Code, it does so either: (i) by stating that "only" certain parties may pursue relief under that section or chapter; or (ii) by specifically excluding certain parties. This approach, of course, is only logical: it would make no sense for Congress to have enacted standing provisions of general applicability (e.g., section 1109(b)) if Congress had intended each section of the Code to be self-contained on the standing question.

The court below adopted the rule that only parties that are expressly authorized to pursue relief under a particular section of the Code may do so. Thus, the court reasoned, because section 506(c) mentions trustees but not administrative claimants, therefore administrative claimants cannot recover under the section. As support for its analysis, the court recited the "ancient canon stating that *expressio unius est exclusio alterius* [the mention of one thing excludes others]." *In re Hen House Interstate, Inc.*, 177 F.3d at 722 n.4. But as this Court has observed, while "[i]t is often a valuable servant, [the *expressio* maxim is] a dangerous master to follow in the construction of statutes. . . ." *Ford v. United States*, 273 U.S. 593, 612 (1927) (citation omitted). As the Court further explained in *Ford*, "the 'exclusio' is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice." *Id.* (citations and internal quotations marks omitted). In this case, the admonition provides compelling advice precisely because use of the *exclusio* maxim to deny administrative claimants standing under section 506(c) conflicts with the overall structure, language, and logic of the Bankruptcy Code, and imposes a dysfunctional limitation on the statutory text that is not warranted or compelled by the words of the statute itself. *Cf.* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 536 (1947) (observing that "[o]ne must listen attentively to what [a statute] does not say.").

As this Court has properly concluded, section 506 should be construed in conjunction with its sister statutes, including sections 503(a) and 1109(b). As these and other sections of the Bankruptcy Code make plain, the *en banc* court's restrictive interpretation of section 506(c) is unsound, and should be reviewed and corrected at this time.

IV.

THE COURT OF APPEALS' RULING IS IN CONFLICT WITH THIS COURT'S PRIOR DECISION IN *MEYER v. FLEMMING.*

In *Meyer v. Flemming*, 327 U.S. 161 (1946), this Court addressed the argument under the prior Bankruptcy Act that, after the commencement of a bankruptcy proceeding and the appointment of a bankruptcy trustee, the debtor no longer had standing to prosecute a cause of action that he had previously commenced prior to filing for bankruptcy relief. In analyzing the matter, the Court recognized the general rule that, once a bankruptcy action has commenced, the right to prosecute a prepetition cause of action against third parties rightfully vests in the bankruptcy estate to be pursued by the trustee. *Id.* at 165. The Court also held, however, that "[i]f, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation." *Id.* at 166. Although the *en banc* court in this case ignored the analysis in *Meyer*, the logic of the decision applies.

If administrative claimants are not entitled to pursue their own claims for relief under section 506(c), the claims of these parties often will not be pursued at all. *See McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (W.D. Mich. 1991) (observing that "[b]ecause the trustee and debtor have no economic incentive to seek . . . recovery [under section 506(c) on behalf of an unpaid administrative claimant], the secured creditor may obtain a windfall at the expense of the unpaid claimant if the Court were not to recognize the claimant's independent right to

sue under 506(c).") (citations and internal quotation marks omitted). The present case well illustrates this concern. Here, the chapter 7 trustee has no funds to litigate with Magna because Magna holds a lien on all of the estate's assets, and Magna has refused even to release funds to pay administrative claims that it previously agreed should be paid from its collateral. Moreover, the trustee has no interest in pursuing relief against Magna on Hartford's behalf. Trustees in bankruptcy represent the general creditors of the debtor's estate, and have little incentive to use scarce estate assets to litigate against well-funded secured creditors for the benefit of a single postpetition claimant. Magna knows this. That is why Magna has fought to establish the precedent that only trustees may pursue relief under section 506(c) — to obtain on a procedural ground the very windfall that section 506(c) was intended to prevent. *See* 4 Lawrence P. King, *et al.*, *Collier on Bankruptcy*, ¶ 506.05 at 506-125 (15th ed. rev. 1999) (observing that the purpose of section 506(c) is to ensure that certain administrative expenses that benefit the secured creditor are paid from the secured creditor's collateral to prevent the secured creditor from receiving a windfall at the expense of the administrative creditor). *See also Architectural Bldg. Components v. McClarty, (In re Foremost Mfg. Co.)*, 137 F.3d 919, 923 (6th Cir. 1998) (observing that "[t]he plain purpose of § 506(c) — to prevent unjust enrichment of secured creditors — is one that may be important to parties other than to the trustee, and the trustee's interest may not be significant enough to spur him to act. When courts allow these other parties to seek surcharges, they are improving the probability that the statute's true purpose will be vindicated.").

Whether because of the disproportionate expense involved in pursuing the matter, a lack of funds, the

uncertainty of the outcome, or simply the trustee's general reluctance to pursue relief on behalf of a single claimant, an unpaid administrative creditor should be entitled to pursue its own claim for relief under section 506(c). *Cf. Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 67 (1992) (observing that "the power to enforce the performance of [a statutory remedy] must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist."). Because the court below failed to adhere to this principle as articulated in the bankruptcy context in *Meyer*, the Court should grant review of the case at this time.

CONCLUSION

For the foregoing reasons, Hartford respectfully requests that the Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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September 3, 1999

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED JUNE 7, 1999

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 97-3859

In re: Hen House Interstate, Inc.,

Debtor.

Hartford Underwriters Insurance Company,

Movant – Appellee,

v.

Magna Bank, N.A., formerly known as Magna Bank of Illinois, N.A.,

Respondent – Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: October 22, 1998

Filed: June 7, 1999

Before BOWMAN,[1] Chief Judge, HEANEY, McMILLIAN, RICHARD S. ARNOLD, FAGG, WOLLMAN, BEAM,

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1. The Honorable Pasco M. Bowman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the end of the day on April 23, 1999. He has been succeeded by the Honorable Roger L. Wollman.

Appendix A

LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges, *en banc*.

BOWMAN, Chief Judge.

Magna Bank, N.A., appeals the judgment of the District Court affirming the judgment of the Bankruptcy Court in favor of Hartford Underwriters Insurance Company. The sole question presented for review by the Court en banc is the threshold question of whether Hartford has statutory standing to surcharge Magna's collateral under 11 U.S.C. § 506(c) (1994). We reverse.

I.

Magna[2] made various loans to Hen House Interstate, Inc. (Debtor), which owned and operated a number of restaurants, service stations, gift stores, and an outdoor advertising firm. To secure the loans, Magna took a security interest in essentially all of the Debtor's real and personal property. On September 5, 1991, the Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Missouri. When the Debtor filed its petition, it was indebted to Magna in the amount of approximately $4.1 million. The Debtor retained possession of its assets and continued operation of its businesses after commencing the Chapter 11 proceedings.

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2. Magna is the successor in interest to Landmark Bank of Illinois. We refer to Magna herein notwithstanding that some of the facts pertain to Landmark Bank prior to its acquisition by Magna, and notwithstanding that on October 9, 1998 Magna was absorbed by merger into Union Planters National Bank.

Appendix A

The day after the Debtor filed its Chapter 11 petition, Magna agreed to lend the Debtor an additional $300,000 to help finance the Debtor's post-petition reorganization efforts. The Bankruptcy Court approved the loan agreement in its final financing order and authorized the Debtor to use the proceeds of the post-petition loan and the cash collateral that was subject to Magna's security interest to pay expenses set forth in an appended budget. The budget allowed for workers' compensation expenses in the amount of approximately $8600 per month. Upon approval of the loan agreement, Magna disbursed the entire $300,000 of loan proceeds to the Debtor.

Despite the additional financing provided under the post-petition loan agreement, the Debtor's attempts at reorganization failed. In January 1993, the Bankruptcy Court converted the Debtor's Chapter 11 case into a Chapter 7 liquidation proceeding and appointed a trustee of the Chapter 7 estate.

During the Debtor's attempted Chapter 11 reorganization, Hartford provided workers' compensation insurance coverage to the Debtor. The terms of the insurance policy required the Debtor to pay a premium to Hartford each month. The Debtor made an initial premium deposit and a subsequent premium payment, but otherwise failed to pay the monthly premium required by the policy. The unpaid premiums amount to $51,871.40.

When the Chapter 11 reorganization failed and the Debtor's case was converted to a Chapter 7 proceeding, Hartford brought an action pursuant to Bankruptcy Code § 503 seeking the allowance of its claim as an administrative

expense and Bankruptcy Code § 506(c) seeking to recover the unpaid premiums by surcharging Magna's collateral. The Bankruptcy Court, following the holding of a three-judge panel of our Court in *United States, Internal Revenue Service v. Boatmen's First National Bank*, 5 F.3d 1157, 1159 (8th Cir. 1993), that non-trustees have standing under § 506(c) to surcharge a secured creditor's collateral, determined that Hartford had standing to seek recovery pursuant to § 506(c) and ordered the surcharge of Magna's collateral. Magna appealed to the District Court claiming, *inter alia*, that § 506(c) did not accord Hartford standing to assert its claim. The District Court, also relying on *Boatmen's*, affirmed the judgment of the Bankruptcy Court, and Magna appealed to this Court.

A three-judge panel of this Court affirmed the judgment of the District Court, holding, among other things, that *Boatmen's* was controlling and that Hartford therefore had standing to seek recovery under § 506(c). But two members of the panel expressed their belief that *Boatmen's* had been wrongly decided and should be reconsidered by the Court en banc. *See Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 150 F.3d 868, 871 n.4 (8th Cir. 1998); *id.* at 873 (Hansen, J., concurring). We granted Magna's suggestion for rehearing en banc on the issue of Hartford's standing to seek recovery and vacated the panel opinion. We now overrule *Boatmen's* to the extent it construes § 506(c) to empower a non-trustee to surcharge an allowed secured creditor's collateral under that section and hold that Hartford, a non-trustee claimant, lacks standing to assert a § 506(c) claim.

II.

As the second reviewing court, we apply the same standard as that applied by the District Court; we review de novo the Bankruptcy Court's determination of the single issue of law presented here. *See Halverson v. Estate of Cameron (In re Mathiason)*, 16 F.3d 234, 235 (8th Cir. 1994).

Initially, we note that Hartford asserts no claim against Magna or its collateral outside of the Hen House bankruptcy proceeding. The nature and extent of the potential liability of Magna, as an allowed secured creditor in that bankruptcy proceeding, is established by the Bankruptcy Code; more particularly, it is established for purposes of this case by § 506(c). Despite arguments made by Hartford asserting its § 506(c) standing to surcharge property securing Magna's claim based on other provisions of the Bankruptcy Code, the fact is that § 506(c) is the only provision of the Code that directly addresses the issue of standing that is before us. Moreover, § 506(c) is the only provision of the Code that authorizes any party to a bankruptcy proceeding to recover from property securing the claim of an allowed secured creditor such as Magna. It would be extremely odd were Congress to have expanded the potential § 506(c) liability of allowed secured creditors by means of the other Code provisions put forward by Hartford, which in one way or another deal with the assertion of claims against the bankruptcy estate, as distinguished from claims against the property of allowed secured creditors.[3] We do not believe

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3. The general rule is that administrative expenses cannot be charged against secured collateral and are chargeable against only the unsecured collateral of the estate pursuant to Bankruptcy Code (Cont'd)

Congress intended to do any such thing and, therefore, we focus on § 506(c).

Section 506(c) clearly states, "*The trustee* may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." 11 U.S.C. § 506(c) (1994) (emphasis added). The proper construction of any statute, the Bankruptcy Code included, begins with the language of the statute itself. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (construing Bankruptcy Code § 506(b) according to its plain

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(Cont'd)
§ 503. *See* 11 U.S.C. § 503(a) (1994); *Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 324 (3d Cir. 1995); *In re Swann*, 149 B.R. 137, 143 (Bankr. D.S.D. 1993). Therefore, Hartford, despite its argument to the contrary, may not seek to surcharge Magna's collateral under § 503 and may look only to § 506(c) for that purpose.

Hartford seeks standing under Bankruptcy Code § 1109(b) as well, *see* 11 U.S.C. § 1109(b) (1994) ("A party in interest, including . . . a creditor . . . may raise and may appear and be heard on any issue in a case under this chapter."), but § 1109(b) is not the correct avenue for recovery for the reason that § 1109(b) is inapplicable to the Chapter 7 proceeding which underlies this case. *See in re Taylor & Assocs., L.P.*, 191 B.R. 374, 381-82 n.5 (Bankr. E.D. Tenn. 1996) ("Section[ ] 1109 . . . [is] applicable exclusively to Chapter 11 cases and ha[s] no application to Chapter 7."); *cf. In re Polo Club Apartments Assocs. L.P.*, 150 B.R. 840, 856-57 (Bankr. N.D. Ga. 1993) (noting that subchapter I of Bankruptcy Code Chapter 11 applies only in cases Under Chapter 11, and does not apply to a case converted from Chapter 11 to Chapter 7).

language); *Harmon v. United States*, 101 F.3d 574, 583 (8th Cir. 1996). The natural reading of § 506(c) entitles only the trustee to seek to surcharge property securing the claim of an allowed secured creditor under that section.[4] When the language of the Bankruptcy Code is clear and unambiguous, "our sole function . . . is to enforce it according to its terms." *Rake v. Wade*, 508 U.S. 464, 471, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993) (internal quotations and citations omitted) (interpreting "unqualified terms" of Bankruptcy Code § 506(b)); *see also Patterson v. Shumate*, 504 U.S. 753, 761, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992) (stating clarity of § 541(e)(2) of Bankruptcy Code obviates need for inquiry beyond language of statute).

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4. Hartford has made an issue of Bankruptcy Code § 1107(a), which provides that Chapter 11 debtors in possession shall, with some exceptions, have "all the rights . . . and powers, and shall perform all the functions and duties," of trustees. 11 U.S.C. § 1107(a) (1994). The express language of § 1107(a) therefore compels the unremarkable conclusion that Chapter 11 debtors in possession may do most of the things trustees may do. In this case, Hartford is neither a Chapter 11 debtor in possession nor a bankruptcy trustee.

Likewise, though Bankruptcy Code §§ 901, 902 and 1203 explicitly grant municipalities in Chapter 9 cases and family farmers in Chapter 12 cases some of the rights, powers, functions and duties of trustees serving in cases under Chapter 11, *see* 11 U.S.C. §§ 901(a), 902(5), 1203 (1994), this is not a Chapter 9 or 12 case and Hartford is not a municipality or a family farmer seeking to reorganize. That Congress chose to expressly grant the enumerated parties carefully circumscribed trustee status in limited circumstances demonstrates only that, had Congress intended a claimant such as Hartford to have § 506(c) standing in the present circumstance, it would have said so. Particularly appropriate here is the ancient canon stating that *expressio unius est exclusio alterius*.

Hartford correctly points out that our conclusion here is not the consensus of the circuits that have considered the issue. A majority of those circuits has held that § 506(c) grants standing to non-trustees to pursue surcharge claims under that section. *See Loudoun Leasing Dev. Co. v. Ford Motor Credit Co. (In re K & L Lakeland, Inc.)*, 128 F.3d 203, 206 (4th Cir. 1997) (listing cases). But each of the circuits arriving at a conclusion contrary to the one we reach today has done so by circumventing the plain language of the statute and resting its determination instead upon policy considerations and equitable concerns. *See In re Parque Forestal, Inc.*, 949 F.2d 504, 511-12 (1st Cir. 1991) ("[The] courts of appeals which have considered the question have permitted recovery by third parties who equitably come to stand in the trustee's shoes."); *Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995) ("Although § 506(c) in terms refers only to recovery by the trustee, we . . . have held that administrative claimants other than trustees have standing to recover under § 506(c), particularly when no other party has an economic incentive to seek recovery on the claimant's behalf."); *New Orleans Pub. Serv., Inc. v. First Fed. Sav. & Loan Ass'n (In re Delta Towers, Ltd.)*, 924 F.2d 74, 76-77 (5th Cir. 1991) ("Despite the seemingly unambiguous language, courts have allowed a [non-trustee] claimant to use § 506(c) . . . ."); *North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229, 232 (9th Cir. 1991) ("No compelling policies are served by a restrictive reading of § 506(c) . . . ."), *cert. denied*, 506 U.S. 821, 113 S.Ct. 71, 121 L.Ed.2d 37 (1992). Policy considerations and equitable concerns, however, are impermissible bases for statutory interpretation when, as

here, the language of the statute is clear and unambiguous. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 540, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (eschewing policy determinations for which the Bankruptcy Code gives no authority); *McCuskey v. Central Trailer Servs., Ltd.*, 37 F.3d 1329, 1332 (8th Cir. 1994) (declining trustee's invitation to turn to bankruptcy policy considerations to guide interpretation of plain language of Bankruptcy Code § 546(a)(1)). "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988). We therefore respectfully disagree with those circuits holding that § 506(c) grants non-trustees standing to seek recovery under that section.

More persuasive is the determination of the Court of Appeals for the Fourth Circuit that "[t]he language of § 506(c) is clear and unambiguous. It grants only trustees the authority to seek recovery of postpetition costs and expenses from the collateral of a secured creditor." *Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 484 (4th Cir. 1994); *see also K & L Lakeland*, 128 F.3d at 206-07.

Moreover, although we base our holding on the plain language of § 506(c), we note that the position espoused by Hartford would undermine the carefully crafted equality-of-distribution scheme fundamental to the operation of the Bankruptcy Code. *See Begier v. IRS*, 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code."). Entirely consistent with this scheme is 506(c)'s

grant of standing to a bankruptcy trustee to recover administrative expenses from the property securing the claim of an allowed secured creditor, the proceeds of which recovery become a portion of the bankruptcy estate and are distributed pro rata among creditors according to their relative priorities. In contrast, the result of the position urged by Hartford would be that the administrative expenses recovered by a non-trustee claimant would not be incorporated into the bankruptcy estate or otherwise contributed to appropriate distribution of the debtor's property among its creditors. Such a result would be incompatible with the fundamental equal distribution goals of the Bankruptcy Code. In addition, as the Fourth Circuit suggested in *JKJ Chevrolet*, to allow non-trustee claimants (other than the debtor) to bring § 506(c) claims is to invite "a flood of satellite litigation by those seeking to avoid a pro rata division of the estate." 26 F.3d at 484 n.6 (citing *Boyd v. Dock's Corner Assocs. (In re Great N. Forest Prods., Inc.)*, 135 B.R. 46, 69 (Bankr. W.D. Mich. 1991)).

Finally, for the first time in this litigation Hartford asserts standing under Federal Rule of Bankruptcy Procedure 7071 to enforce the terms of the final financing order of the Bankruptcy Court. *See* Fed. R. Bankr. P. 7071 (incorporating Fed. R. Civ. P. 71) ("When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party . . . ."). The final financing order directs the Debtor to pay expenses out of cash collateral covered by Magna's security interest. *See In re Hen House Interstate, Inc.*, No. 91-45623-293, para. 24, at 17 (Final Order of Bankruptcy Court). Rule 7071, however, was not the basis of the claim asserted by Hartford in its application to the Bankruptcy

Court, in which Hartford sought to surcharge Magna's collateral pursuant to Bankruptcy Code § 506(c). Having stated only a § 506(c) surcharge claim in its complaint and throughout this litigation, Hartford cannot now, after the case has come to the rehearing en banc stage in this Court, embark upon a different claim never pleaded to the Bankruptcy Court and assert that any standing to bring that claim is a ground for standing in the § 506(c) claim it actually brought. That Hartford might or might not have standing to bring a Rule 7071 claim is beside the point, for that is a new claim that cannot initially be brought forward at the appellate level.[5] We therefore do not reach the issue of Hartford's standing

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5. Moreover, the Rule 7071 claim is not within the scope of our order granting "rehearing en banc . . . limited to the issue of standing." *Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, No. 97-3859EMSL (8th Cir. Sept. 22, 1998) (Order Granting Rehearing En Banc). Although our order (the purpose of which, after all, was to limit rehearing to a single issue, not to invite new claims) refers generically to "the issue of standing," we could only have intended that phrase to mean the issue of § 506(c) standing. In its motion to file a supplemental brief after rehearing en banc had been granted, Hartford made no reference to Rule 7071. Instead, Hartford emphasized that "[t]he question of standing under section 506(c) is one of great importance to administrative claimants such as Hartford, and the Court's en banc resolution of this issue will affect many such claimants in innumerable bankruptcy cases." Appellee's Motion to File Supplemental Brief at 2-3 (Sept. 22, 1998). Likewise, Magna, in its suggestion for rehearing en banc, limited discussion to § 506(c). For these reasons, it strains credulity to think that our order granting rehearing en banc invited Hartford to assert a Rule 7071 claim at this late stage. We are thoroughly satisfied that our review is limited to the issue of Hartford's standing to bring a § 506(c) claim, the claim that Hartford in fact asserted.

to bring a Rule 7071 claim. *Cf. Stupak-Thrall v. United States*, 89 F.3d 1269, 1275 n.4 (6th Cir. 1996) (declining to hear issue urged for first time to panel in reply brief and reasserted in supplementary brief to court en banc; otherwise party raising argument on en banc rehearing would "be allowed to deprive the panel of the ability to address the issue first"), *cert. denied*, 519 U.S. 1090, 117 S.Ct. 764, 136 L.Ed.2d 711 (1997); *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 397 (1st Cir.) (order denying rehearing) (holding party who failed to assert argument in district court, and in supplemental briefing and oral argument before panel, "cannot be permitted to raise a new issue for the first time on petition for rehearing in the court of appeals"), *cert. denied*, 498 U.S. 891, 111 S.Ct. 233, 112 L.Ed.2d 193 (1990).

The single issue for determination by this Court en banc remains the issue stated at the outset: whether Hartford has standing under § 506(c). We hold that § 506(c) permits only the trustee to proceed under that section. Hartford therefore lacks standing to surcharge Magna's collateral under § 506(c).

III.

United States, Internal Revenue Service v. Boatmen's First National Bank, 5 F.3d 1157 (8th Cir. 1993), which held that parties other than the trustee have standing to surcharge property securing the claim of an allowed secured creditor under § 506(c), is overruled. The decision of the District Court is reversed. The case is remanded to the District Court with instructions that the Bankruptcy Court be directed to vacate its judgment and dismiss Hartford's § 506(c) claim for lack of standing.

HEANEY, Circuit Judge, dissenting, with whom MCMILLIAN, RICHARD S. ARNOLD, BEAM, and MURPHY, Circuit Judges, join.

Today this court rejects the view of four other circuits, ignores the teaching of the leading bankruptcy treatise, and departs from the well-established view that administrative claimants have § 506(c) standing to enforce administrative claims against secured creditors who have benefitted by the goods or services provided by an administrative claimant. Because the prudential standing doctrine requires this court to confer § 506(c) standing to Hartford, I respectfully dissent.

An administrative expense may be surcharged against a secured creditor's collateral if the expense was necessary, reasonable, and directly benefitted the secured creditor, *Brookfield Prod. Credit Ass'n v. Borron*, 738 F.2d 951, 952-53 (8th Cir. 1984), or if a secured party either directly or impliedly consented to the expense, *Daniel v. AMCI, Inc. (In re Ferncrest Court Partners)*, 66 F.3d 778, 782 (6th Cir. 1995). The original panel opinion stated that

> Magna agreed to the continued operation of the Debtor's businesses in the hopes of receiving a greater return through reorganization rather than through liquidation. Magna thereby "agreed to accept the expenses and risks associated with [the] anticipated benefit." One such expense is workers' compensation insurance. Under Missouri law, an operating business is obligated to maintain workers' compensation insurance unless it can demonstrate that it has the ability to self-insure. See Mo. Rev. Stat. § 287, 280 (Supp. 1998).

Hartford Underwriters Ins. Co. v. Magna Bank (In re: Hen House Interstate, Inc.), 150 F.3d 868, 872 (8th Cir. 1998) (quoting *IRS v. Boatmen's First National Bank*, 5 F.3d 1157, 1160 (8th Cir. 1993)). The original panel further held that "Magna consented to the workers' compensation insurance expenses," and proceeded to the issue of standing. *Hartford*, 150 F.3d at 871. The panel concluded that Hartford had standing under *Boatmen's*. *See id.* at 871. This court granted Hartford's petition for rehearing solely on the issue of standing.

I agree with the court that the sole issue before us is whether Hartford has standing to surcharge Magna's collateral. I believe it has. Four circuits have adopted this view, *See e.g. North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229, 232 (9th Cir. 1991), *cert. denied*, 506 U.S. 821, 113 S.Ct. 71, 121 L.Ed.2d 37 (1992); *In re Parque Forestal, Inc.*, 949 F.2d 504, 511 (1st Cir. 1991); *New Orleans Pub. Serv., Inc. v. First Fed. Sav. & Loan Ass'n (In re Delta Towers, Ltd.)*, 924 F.2d 74, 77 (5th Cir. 1991); *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91, 94 (3d Cir. 1986). The court's view is also supported by the leading scholarly work on bankruptcy:

> The reasoning behind the approach which extends standing to creditors and other claimants is that a secured creditor who received a direct benefit from the rendition of services or provision of goods by an administrative claimant . . . should have the collateral charged for that benefit, regardless of whether the proceeds of the charge are paid to the trustee in reimbursement for the trustee's prior payment to the claimant, or are paid to the claimant directly. Otherwise, if the trustee does not have available funds to pay the claimant, the trustee has no economic incentive to seek a recovery under section 506(c) with respect to amounts that will be paid over to the claimant. As a result, the secured creditor may obtain a windfall at the expense of the unpaid claimant.

4 Collier on Bankruptcy ¶ 506.05[8] at 506-142-43 (Lawrence P. King ed., 15th ed. 1998). The majority view has been in effect since 1986, and I believe that Congress has acquiesced to the majority's resolution of the conflict. *See Johnson v. Transportation Agency*, 480 U.S. 616, 629 n.7, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987).

Had Congress intended to limit § 506(c) standing to trustees, it could have included the word "only" in the statute. Because it failed to do so and because Congress did not expressly deny § 506(c) standing to administrative claimants, the prudential standing doctrine dictates that this court confer § 506(c) standing on Hartford.

Any determination of standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). In addition to the threshold requirements of Article III, the applicable prudential standing requirement is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute." *Data Processing Serv. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). While Congress

can limit standing beyond that allowed by Article III of the United States Constitution, "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest . . . ." *Id.* at 154, 90 S.Ct. 827. While *Data Processing* applied the zone-of-interests test to suits under the Administrative Procedure Act, the Supreme Court has since listed it among the other generally applicable prudential standing requirements. *See Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). Where Congress has neither expressly allowed nor denied administrative claimants § 506(c) standing, the Supreme Court has held that "Congress legislates against the background of our prudential standing doctrine, which applies *unless it is expressly negated*." *Id.* at 163, 117 S.Ct. 1154 (emphasis added); *see also Data Processing*, 397 U.S. at 154, 90 S.Ct. 827 ("Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise").

There can be no doubt that Hartford has Article III standing, and because Congress has not expressly negated the prudential standing doctrine in § 506(e), Hartford also has § 506(c) standing. To satisfy Article III standing, a plaintiff must allege that (1) he or she suffered or imminently will suffer an injury in fact; (2) the injury is fairly traceable to the defendant's conduct; and (3) a favorable court decision is likely to redress the injury. *See Florida Gen. Contractors v. Jacksonville*, 508 U.S. 656, 663-64, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993) (citations omitted). Here, Hartford provided statutorily-required workers' compensation insurance and was not paid. Magna consented to the court-authorized expenditures and benefitted from them in two

ways. First, Magna benefitted from the heightened possibility it would recoup the full value of its security interest. Second, it benefitted insofar as liquidating the various businesses as going concerns optimized its profit from liquidation. Finally, a favorable decision to Hartford would undoubtedly redress its injury.

Having satisfied the general requirements for Article III standing, "the applicable prudential standing requirement [is] 'whether the interest sought to be protected by [Hartford] is *arguably* within the zone of interests to be protected or regulated by the statute.' " *Bennett*, 520 U.S. at 162, 117 S.Ct. 1154 (citing *Data Processing*, 393 U.S. at 153, 90 S.Ct. 827) (emphasis added). "The [zone-of-interests] test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987) (footnote omitted). Section 506(c) provides that "[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim. 11 U.S.C. § 506(c). Here, it is clear that Hartford's claim was reasonable and necessary. Indeed, the continuance of workers' compensation insurance was mandated by law if Hen House was to continue in business. Additionally, the expenditures benefitted Magna as discussed above. Finally, Hartford's § 506(c) standing is consistent with other provisions of the Bankruptcy Code. *See, e.g.*, 11 U.S.C. §§ 503(a), 1109(b).

The court joins the Fourth Circuit[6] in its assertion that conferring § 506(c) standing to administrative claimants circumvents the Bankruptcy Code's distribution scheme:

> Allowing a claimant to proceed directly against a secured creditor would circumvent this distribution scheme, potentially causing an inequitable division of the estate. For example, if an estate has no unencumbered assets, an administrative claimant recovering directly from a secured creditor might receive full reimbursement while other administrative claimants, whose services were also necessary to the preservation of the estate, would receive nothing. An administrative claimant proceeding against a secured creditor in effect would be granted priority over the other claimants in its same class. We are of the opinion that if Congress had intended to alter so fundamentally the structure and principles underlying bankruptcy proceedings, it would have done so expressly.

Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.), 26 F.3d 481, 484 (4th Cir. 1994) (footnotes and citations omitted). In my view, Congress

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6. While the court relies heavily on the reasoning of the Fourth Circuit, even that court has recognized the fact that a secured creditor should not be able to immunize its windfall under the theory that administrative claimants lack § 506(c) standing. *See Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 485 n.7 (4th Cir. 1994) (recognizing the possibility that "a bankruptcy court could grant derivative standing to a claimant . . . to prosecute a § 506(c) action.").

expressly altered the distribution scheme when it enacted § 506(c). As noted in our *Boatmen's* opinion, administrative expenses are generally paid from the unencumbered assets of the bankruptcy estate rather than secured collateral. *See* 5 F.3d at 1159; *see also In re JKJ Chevrolet, Inc.*, 26 F.3d at 483 (recognizing general rule). Section 506(c) clearly alters the general rule by requiring secured creditors to pay administrative expenses when, *inter alia*, the expenditures benefit the secured creditor. Thus, the obligation created by § 506(c), not the identity of the party enforcing that obligation, alters the distribution scheme.

The court departs from its view that it will not entertain equitable considerations and joins the Fourth Circuit in its argument that conferring § 506(c) standing to administrative claimants will lead to inequitable division of bankruptcy estates because particular administrative claimants may be compensated while other administrative claimants, unsecured creditors, or even secured creditors could go unpaid. Even if this were true, this is a criticism of the obligation created by § 506(c), not of allowing a particular party to enforce that obligation. Congress, not the courts, codified an equitable mechanism in § 506(c) by which a secured creditor may be compelled to reimburse the administrative expenses that preserve or dispose of the secured property to the extent that those expenditures have increased the property's value.

Finally, I believe that Hartford's claim that Federal Rule of Bankruptcy Procedure 7071 provides an independent basis for recovery may properly be considered by this court. The court argues that because Hartford did not raise this claim before the original panel in this case and raised it in the first

instance before this court en banc, we should not consider the claim. In my view, Hartford may be excused from failing to raise the claim before the original panel because the facts of this case fall squarely within the law established in our *Boatmen's* opinion; and as Chief Judge Bowman correctly noted in our original panel opinion, " '[o]nly the court en banc can overrule another panel's decision.' " *Hartford*, 150 F.3d at 871 (quoting *Smith v. Copeland*, 87 F.3d 265, 269 (8th Cir. 1996)). Because we are writing on a clean slate as a court en banc, we may certainly entertain Hartford's claim now.

Federal Rule of Bankruptcy Procedure 7071 incorporates Rule 71 of the Federal Rules of Civil Procedure, which provides: "When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if he were a party . . . ." Fed. R. Civ. P. 71. Hartford argues that the bankruptcy court, with Magna's express consent, directed the debtor to pay the premiums for the workers' compensation insurance that Hartford provided. Because it was the intended beneficiary of the order, Hartford argues that it may recover from Magna under Rule 7071. In the interests of judicial economy, I would hold that, even if Hartford does not have standing under § 506(c), it should recover under Rule 7071.

Today this court overrules six years of Eighth Circuit law, rejects the views of four other circuits, and ignores the teaching of the leading bankruptcy treatise. It does this in disregard of the prudential standing doctrine. For the reasons stated above, I respectfully dissent.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED JULY 27, 1998

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3859

In re: Hen House Interstate, Inc.,

Debtor.

Hartford Underwriters Insurance Company,

Movant – Appellee,

v.

Magna Bank, N.A., formerly known as
Magna Bank of Illinois, N.A.,

Respondent – Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: May 12, 1998
Filed: July 27, 1998

Order Granting Rehearing Sept. 22, 1998.

Before BOWMAN, Chief Judge, HEANEY and HANSEN, Circuit Judges.

BOWMAN, Chief Judge.

Appendix B

Hartford Underwriters Insurance Company brought an action pursuant to the Bankruptcy Code, *see* 11 U.S.C. §§ 503 and 506(c) (1994), against Magna Bank,[1] a secured creditor of Hen House Interstate, Inc. (hereinafter "Debtor"), the debtor in the underlying bankruptcy. Hartford sought the payment of workers' compensation insurance premiums that went unpaid by the Debtor during the period in which the Debtor attempted a Chapter 11 reorganization. The Bankruptcy Court[2] ordered the surcharge of Magna's collateral pursuant to § 506(c) to secure payment of the insurance premiums, and the District Court[3] affirmed. Magna appeals.

Magna contends that Hartford lacked standing to bring its claim under § 506(c), that Magna's collateral may not be surcharged on the basis that it agreed to the continuation of the Debtor's business, that the judgment constitutes an impermissible modification of the original financing order, and that the equities favor denying the surcharge of Magna's collateral. We affirm.

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1. Magna Bank is the successor in interest to the rights, claims, and interests of Landmark Bank of Illinois. We refer to Magna herein notwithstanding that certain facts pertain to Landmark Bank prior to its acquisition by Magna.

2. The Honorable David P. McDonald, United States Bankruptcy Judge for the Eastern District of Missouri.

3. The Honorable Charles A. Shaw, United States District Judge for the Eastern District of Missouri.

Appendix B

I.

The Debtor owned and operated a number of businesses located throughout the Midwest, including restaurants, service stations, gift stores, and an outdoor advertising firm. On September 5, 1991, the Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code. During the course of its Chapter 11 case, the Debtor remained in possession of its assets and continued to operate its businesses. Ultimately, the Debtor's efforts to reorganize were unsuccessful and, while still operating under Chapter 11, the Debtor liquidated its assets through a combination of going-concern sales and sales of its shut-down properties. Thereafter, in January 1993, the Debtor's Chapter 11 case was converted into a Chapter 7 liquidation proceeding.

At the time the Debtor initially filed for bankruptcy relief, it owed Magna approximately $4.1 million. As security for repayment of the debt, Magna had a security interest in essentially all of the Debtor's real and personal property. The day after the Debtor filed its Chapter 11 petition, Magna agreed to loan the Debtor $300,000 to help finance the Debtor's reorganization efforts. The Debtor moved for authorization of the post-petition loan. In its financing order, to which both Magna and the Debtor agreed, the Bankruptcy Court granted the motion authorizing the loan and, in addition, authorized the Debtor's use of cash collateral that was subject to Magna's security interest to pay expenses set forth in an attached budget. *See* Final Order para. 24, at 17. The budget provided for workers' compensation expenses in the amount of approximately $8,600 per month. Further, the financing order required that the Debtor "pay or cause

to be paid all ordinary and necessary expenses of operation . . . which are allowed in the Budget." Final Order para. 25, at 18. The financing order also contained a provision that "no expenses of administration of Debtor's Chapter 11 case . . . shall be charged against [Magna] or [its collateral] . . . pursuant to § 506(c) of the Bankruptcy Code . . . without the prior written consent of [Magna], and no such consent shall ever be implied." Final Order para. 33, at 24-25. After entry of the financing order, Magna disbursed the entire $300,000 to the Debtor.

During the period in which the Debtor attempted its Chapter 11 reorganization, Hartford provided workers' compensation insurance coverage. Under the terms of the policy, the Debtor was required to make monthly payments to Hartford. Despite the fact that the Debtor quit paying the monthly premiums, Hartford continued to provide coverage. At one point, the Debtor paid a portion of the amount due Hartford, but to date $51,871.40 remains in unpaid premiums for the period in which Hartford provided the coverage. Hartford filed for relief pursuant to 11 U.S.C. § 503 seeking the allowance of its claim as an administrative expense and 11 U.S.C. § 506(c) seeking to recover its claim by surcharging Magna's collateral.

II.

"As the second reviewing court, our standards are the same as the district court's; we review the bankruptcy court's findings of fact for clear error and its conclusions of law *de novo*." *Halverson v. Estate of Cameron (In re Mathiason)*, 16 F.3d 234, 235 (8th Cir. 1994). Magna first urges this Court

to reconsider and overrule our prior decision, *United States, Internal Revenue Service v. Boatmen's First National Bank of Kansas City*, 5 F.3d 1157, 1159 (8th Cir. 1993), wherein we held that third parties have standing to surcharge a secured creditor's collateral under § 506(c).[4] Section 506(c) provides, "The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." 11 U.S.C. § 506(c). In *Boatmen's*, we interpreted this provision to allow administrative claimants to assert their claims under § 506(c). As a three judge panel, we lack authority to reconsider *Boatmen's*, *see Smith v. Copeland*, 87 F.3d 265, 269 (8th Cir. 1996) ("Only the court en banc can overrule another panel's decision."), and therefore hold that Hartford had standing under § 506(c) to assert its administrative claim for unpaid workers' compensation insurance premiums.

Magna next contends that the Bankruptcy Court and the District Court erred in allowing Hartford to surcharge Magna's collateral under § 506(c). Generally, administrative expenses may not be charged against secured collateral but instead share in the distribution of the unsecured collateral pursuant to 11 U.S.C. § 503. *See Boatmen's*, 5 F.3d at 1159. Section 506(c) creates an exception to this general rule,

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4. As a member of the panel, I dissented from the decision in *United States, Internal Revenue Service v. Boatmen's First National Bank of Kansas City*, 5 F.3d 1157 (8th Cir. 1993), because the plain language of 11 U.S.C. § 506(c) gives only the trustee standing to surcharge a secured creditor's collateral. *See id.* at 1161. I remain of that view today but recognize *Boatmen's* as controlling precedent in this Circuit.

providing that an expense may be surcharged against a secured creditor's collateral if the expenditure was necessary, reasonable, and directly benefited the secured creditor. *See Brookfield Prod. Credit Ass'n v. Borron*, 738 F.2d 951, 952 (8th Cir. 1984). In the alternative, a secured party's collateral may be surcharged where the secured party either directly or impliedly consented to the expense. *See Daniel v. AMCI, Inc. (In re Ferncrest Court Partners, Ltd.)*, 66 F.3d 778, 782 (6th Cir. 1995).

Magna does not dispute that workers' compensation insurance is a necessary and reasonable expense. Magna does contend, however, that the expense incurred by Hartford in providing workers' compensation insurance did not directly benefit Magna because the Debtor's reorganization efforts ultimately failed and the assets were liquidated. For support, Magna relies on the Bankruptcy Court's statement that "the continued operation of the business failed to improve [Magna's] recovery." Bankruptcy Ct. Mem. Op. at 9. The District Court, however, did not clarify whether it viewed Magna as having received a direct benefit. In any event, while we would be inclined to view Magna as having received a direct benefit, *see Boatmen's*, 5 F.3d at 1160 ("The 'benefit' . . . lies in the *ambition* of the creditor to preserve and improve its secured collateral and the *opportunity* to realize that ambition.") (emphasis added), we need not reach that holding today because we conclude that Magna consented to the workers' compensation insurance expenses.

We believe that the case at bar is in all material aspects similar to *Boatmen's*. In *Boatmen's*, a company that owned and operated a string of dry cleaning stores filed for Chapter

11 bankruptcy. A secured creditor, Boatmen's Bank, agreed to extend post-petition credit so that the debtor company could continue its operations. During the time in which the debtor operated under Chapter 11, its payroll taxes went unpaid. The Internal Revenue Service (IRS) filed an administrative claim pursuant to § 506(c) to recover the unpaid payroll taxes plus interest and penalties. We held that "when a secured creditor agrees to the preservation of the debtor business as a going concern and that preservation requires the payment of payroll taxes, any unpaid post-petition taxes may be charged to the secured collateral." *Boatmen's*, 5 F.3d at 1160.

We have essentially the same set of circumstances here. Magna agreed to the continued operation of the Debtor's businesses in the hopes of receiving a greater return through reorganization rather than through liquidation. Magna thereby "agreed to accept the expenses and risks associated with [the] anticipated benefit." *Id.* One such expense is workers' compensation insurance. Under Missouri law, an operating business is obligated to maintain workers' compensation insurance unless it can demonstrate that it has the ability to self-insure. *See* Mo. Rev. Stat. § 287.280 (Supp. 1998). Moreover, Magna expressly consented in the financing order to the provision authorizing the Debtor's use of its cash collateral for necessary operating expenses, which specifically included workers' compensation insurance premiums, and to the provision requiring that the Debtor pay or cause to be paid all necessary and ordinary expenses.

Magna attempts to distinguish in two ways the facts in *Boatmen's* from those in the present case. First, Magna points

to the fact that in *Boatmen's* the bank had signed an agreement to subordinate its post-petition liens to administrative expenses. Magna thus argues that Boatmen's expressly consented to the surcharge of its collateral for administrative expenses. Magna also points out that this Court in *Boatmen's* found that the bank had received an overall benefit from the debtor's efforts at reorganization. Magna therefore contends that there may have been other sufficient grounds upon which this Court could have allowed the IRS to surcharge Boatmen's collateral. The holding of *Boatmen's*, however, turns neither on Boatmen's agreement to subordinate its liens to administrative expenses nor on the receipt of any direct benefit by Boatmen's. Rather, the holding turns on Boatmen's agreement to the preservation of the debtor's business as a going concern. We find neither attempt to distinguish *Boatmen's* persuasive. Just as in *Boatmen's*, Magna agreed to the continued operation of the Debtor's businesses and therefore consented to the payment of workers' compensation insurance.

In further support of Magna's argument that it did not consent to the payment of workers' compensation insurance, Magna directs us to the provision contained in the financing order, which provides that "no expenses of administration of Debtor's Chapter 11 case . . . shall be charged against [Magna] or [its collateral] . . . pursuant to § 506(c) of the Bankruptcy Code . . . without the prior written consent of [Magna], and no such consent shall ever be implied." Final Order para. 33, at 24-25. This provision, however, does not affect our conclusion that Magna *did* consent to the use of its cash collateral for expenses associated with keeping the Debtor's businesses operating. Furthermore, we believe that

an agreement by a debtor and a secured creditor to prohibit the payment of § 506(c) administrative expenses from the secured creditor's collateral would operate as a windfall to the secured creditor at the expense of administrative claimants. We therefore conclude that such a provision is unenforceable. *See McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (W.D. Mich. 1991) ("[A] provision [that attempts to immunize a secured creditor from surcharge payment obligations under § 506(c)] is not enforceable in light of the congressional mandate that a trustee have the authority to use a portion of secured collateral for its preservation or proper disposal."); *see also In re Willingham Invs., Inc.*, 203 B.R. 75, 79 (Bankr. M.D. Tenn. 1996).

Magna next asserts that the Bankruptcy Court's order constitutes an impermissible modification of the original financing order in violation of 11 U.S.C § 364(e), which provides:

> The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt . . . does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith . . . .

11 U.S.C. § 364(e). The purpose of § 364(e) is to encourage the extension of credit to debtors by permitting creditors to rely on a bankruptcy court's authorization of the transaction. *See Burchinal v. Central Washington Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1488 (9th Cir. 1987). Magna

argues that, because the financing order contained the provision against surcharging Magna's collateral without its consent, the decision by the Bankruptcy Court violates § 364(e). This argument fails, however, because we have concluded above that Magna consented to the payment of workers' compensation insurance premiums by agreeing to the continued operation of the Debtor's businesses. The Bankruptcy Court did not modify or reverse any provision contained in the financing order.

Finally, Magna argues that a surcharge of its collateral in this situation would be grossly inequitable. For support, Magna asserts that the payments already made to Hartford by the Debtor will cover any existing or future claims that may be asserted under the workers' compensation policy and that Hartford could have minimized its exposure by canceling the policy when the premiums first went unpaid. We find neither of these assertions compelling enough to justify a finding that the Bankruptcy Court abused its discretion.

III.

The order of the District Court, affirming the order of the Bankruptcy Court, is affirmed.

HANSEN, Circuit Judge, concurring.

I concur in the court's opinion because, like Chief Judge Bowman, I must respect as controlling circuit precedent the panel decision in *United States, Internal Revenue Service v. Boatmen's First National Bank of Kansas City*, 5 F.3d 1157 (8th Cir. 1993). I agree with the Chief Judge's view first expressed his dissent in *Boatmen's* and reiterated today in footnote four of the court's opinion, that the plain language of 11 U.S.C. § 506(c) gives only a trustee standing to surcharge a creditor's collateral, but that is not the current law of this circuit, and only an en banc court can, and in my view, should, change it.

ORDER
Sept. 22, 1998

Appellant Magna Bank's suggestion for rehearing is granted. The court's opinion and judgment of July 27, 1998, are vacated. The grant of rehearing en banc is limited to the issue of standing.

The clerk is directed to set this case for oral argument at 10:00 a.m. on Thursday, October 22, 1998, in St. Paul, Minnesota. Each side will be granted twenty (20) minutes to present its oral argument.

The parties are directed to submit twenty-five (25) copies of the briefs previously filed in the appeal. These additional copies are due October 2, 1998.

APPENDIX C — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION DATED SEPTEMBER 10, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:96-CV-1991 CAS

In Re:

HEN HOUSE INTERSTATE, INC.

Debtor.

MAGNA BANK OF ILLINOIS,

Appellant,

v.

THE HARTFORD UNDERWRITERS INSURANCE COMPANY,

Appellee.

MEMORANDUM

This is an appeal from a final order of the United States Bankruptcy Court for the Eastern District of Missouri granting appellee The Hartford Underwriters Insurance Company's ("Hartford") Application for Allowance of

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Administrative Expense Pursuant to 11 U.S.C. § 503 and Charge Against Collateral Pursuant to 11 U.S.C. § 506(c). *In re Hen House Interstate, Inc.*, No. 91-45623-293 (Bankr. E.D. Mo. Aug. 14, 1996). The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 158(a) and Rule 8001 of the Federal Rules of Bankruptcy Procedure.

The Bankruptcy Court's order permits Hartford to impose a charge on appellant Magna Bank of Illinois, N.A.'s ("Magna")[1] collateral under 11 U.S.C. § 506(c), for the administrative expense of worker's compensation insurance premiums. Hartford provided workers' compensation insurance to the debtor, Hen House Interstate, Inc., ("Debtor") from September 1, 1991 through September 1, 1992.

In this appeal, Magna contends the Bankruptcy Court erred as follows:

> (1) in holding that Hartford, as a party other than a bankruptcy trustee or debtor-in-possession, had standing to seek relief under the provisions of 11 U.S.C. § 506(c);
>
> (2) in holding that because Magna agreed to the continuing operation of the Debtor's business with

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1. Appellant is presently known as Magna Bank, N.A. It is the successor in interest to the rights, claims and interests of Landmark Bank of Illinois under various financing and loan documents. For purposes of convenience, appellant is referred to as Magna throughout this memorandum, although certain facts pertain to Landmark Bank of Illinois prior of its acquisition by Magna.

the hope that the continuation would allow Magna to recover more than it would in a liquidation, Hartford could surcharge Magna's collateral 11 U.S.C. § 506(c) for any reasonable and necessary services provided to the Debtor, without requiring any showing that such services directly benefited Magna, and in granting Hartford's 11 U.S.C. § 506 (c) application even though no much showing was made in this case;

(3) in finding that it would not be inequitable to allow Hartford to surcharge Magna's collateral under 11 U.S.C. § 506(c) for unpaid worker's compensation insurance premiums; and

(4) in allowing Hartford to surcharge certain charges against Magna's collateral pursuant to the provisions of 11 U.S.C. § 506(c) after having previously entered a final order pursuant to the provisions of 11 U.S.C. § 364(c) and (d) that explicitly prohibited the imposition of any such charges against Magna's collateral without Magna's prior written consent, which consent was never given.

For the reasons which follow, the Court concludes the decision of the Bankruptcy Court should be affirmed.

Discussion.

In reviewing the judgment of the bankruptcy court, this Court reviews legal conclusions *de novo* and findings of fact

under a clearly erroneous standard. *In re Kiellsen*, 53 F.3d 944, 946 (8th Cir. 1995); *In re Muncrief*, 900 F.2d 1220, 1225 (8th Cir. 1990). The parties agree that issues 1, 2 and 4 present questions of law requiring *de novo* review, while issue 3 is subject to review under an abuse of discretion standard.

The Court adopts the Bankruptcy Court's statement of procedural background of this case and its factual findings, including the joint stipulation by the parties, as set forth in the Bankruptcy Court's Memorandum Order of August 14, 1996, at 1-6.

1. *Standing.* Magna argues that because Hartford is neither the bankruptcy trustee nor the debtor-in-possession, it lacks standing to seek recovery under 11 U.S.C. § 506(c). Magna contends the literal language of that statute clearly limits standing to the trustee and the debtor-in-possession, and thus there is no basis for permitting a third party to recover under § 506(c).

The Eighth Circuit has resolved this question contrary to Magna's position. *In United States I.R.S. v. Boatmen's First Nat'l Bank of Kansas City*, 5 F.3d 1157, 1159 (8th Cir. 1993) ("*Boatmen's*"), the Court unequivocally held that an administrative claimant has standing to recover under § 506(c). This Court is not free to disregard binding Eighth Circuit precedent. Thus, the Court concludes the Bankruptcy Court did not err in holding that Hartford, as an administrative claimant, has standing to recover under 11 U.S.C. § 506(c).

2. *Benefit to Magna*. Magna next argues that the Bankruptcy Court erred as a matter of law in holding Hartford was entitled to surcharge Magna's collateral for the amounts in question simply because Magna agreed to the continued operation of Debtor's business in Chapter 11 with the hope that the continuation would allow Magna to recover more than in a liquidation. Magna contends Hartford did not meet its burden to establish that the administrative expense directly benefited Magna.

Section 506(c) of the Bankruptcy Code is an exception to the general rule that administrative expenses of a bankruptcy estate may not be charged against secured collateral but rather share in the distribution of unencumbered assets of the debtor pursuant to 11 U.S.C. § 503. *Boatmen's*, 5 F.3d at 1159. Section 506(c) expresses and applies "the equitable principle that a lienholder may be charged with the reasonable costs and expenses incurred by the debtor . . . which are required to preserve or dispose of the property subject to lien to the extent the lienholder derives a benefit therefrom." 4 L. King, *Collier on Bankruptcy* ¶ 506.04, at 506-49 (15th Ed. rev. 1997).

Under § 506(c), an administrative expense may be surcharged against a secured creditor's collateral if three elements are established: (i) the expense was necessary; (ii) the expense was reasonable; and (iii) the expense directly benefited the secured creditor. *Brookfield Production Credit Ass'n v. Borron*, 738 F.2d 951, 952 (8th Cir. 1984) ("*Borron*"). Magna does not dispute the Bankruptcy Court's determination that the cost of the insurance provided by Hartford was a reasonable and necessary expense of

continuing Debtor's business operations. Magna contends only that the third element is not met, in that Magna was not directly benefited by the worker's compensation insurance.

Relying on the *Boatmen's* decision, the Bankruptcy Court held that because Magna agreed to the continued operation of the Debtor's business with the hope that the continuation would allow it to recover more than it would in a liquidation, it accepted the risk of being charged with the reasonable and necessary costs and expenses of preserving the business. This Court agrees. Where a holder of secured credit consents to the preservation of a debtor's business as a going concern, a "court may treat such consent as an advance acknowledgement that certain of the costs and expenses incurred would benefit such holder. Thus, when such consent has been given, the courts will allow a greater latitude with respect to allowance of costs and expenses." 4 *Collier* ¶ 56.04[3][a][i] at § 506-54,-55; *see Boatmen's*, 5 F.3d at 1160 (allowing recovery of postpetition payroll taxes including penalty and interest where the secured creditor consented to preservation of the debtor's business as a going concern); *In re Annett Ford, Inc.*, 64 B.R. 946, 947 (D. Neb. 1986) (allowing recovery of payroll taxes, penalty and interest which were costs of unsuccessful postpetition operation of business consented to by secured creditor).

In this case, after Magna initially sought relief from the automatic stay, it decided instead to make a $300,000.00 post-petition debtor-in-possession loan to the Debtor. In so doing, Magna anticipated it would receive a greater return through a Chapter 11 filing in which the Debtor's operations

would continue in the hope of a reorganization, rather than from an immediate liquidation of the Debtor's property outside of Chapter 11. Magna was the primary beneficiary of Debtor's continued operation. The payment of worker's compensation insurance was an expense necessary to Debtor's continued operation, as worker's compensation insurance or a demonstrated ability to self-insure is required by law in Missouri. Thus, it follows under *Boatmen's* and *Annett Ford* that the insurance expense may be charged against Magna, even though the Debtor's Chapter 11 reorganization was ultimately unsuccessful.

The fact that the secured creditor in *Boatmen's* specifically agreed to subordinate its post-petition superpriority liens to legitimate administrative expenses of the bankruptcy estate, while relevant to the Eighth Circuit's decision, is not controlling and does not require a different result in this case. The holding of *Boatmen's* turns on the secured creditor's agreement to the preservation of the debtor as a going concern, not its agreement to be subordinated to administrative expenses. *Boatmen's*, 5 F.3d at 1160.

The Eighth Circuit's earlier *Borron* decision, on which Magna relies, is distinguishable because the secured creditor in *Borron* did not consent to continuation of the debtor's business as a going concern. As a result, the Court applied a stricter standard under which a direct, quantifiable benefit to the secured credit must be shown before an administrative expense may be surcharged against secured collateral.

Therefore, the Court concludes the Bankruptcy Court did not err in holding that Hartford could surcharge Magna's

collateral under 11 U.S.C. § 506(c) for worker's compensation insurance premiums.

3. *Abuse of Discretion.* Next, Magna contends that the Bankruptcy Court abused its discretion in permitting Hartford to surcharge Magna's collateral under 11 U.S.C. § 506(c), when Hartford (i) had already received premium payments in excess of any insurance benefits it would have to pay out on the Debtor's behalf, and thus is not seeking to recover for actual losses sustained but rather to obtain a profit; (ii) displayed an extraordinary lack of diligence in protecting its rights under the insurance policy and thus failed to take reasonable efforts to reduce its claim; and/or (iii) expressly acknowledged that it did not rely on the provisions of § 506(c) in providing unsecured credit to the Debtor.

The Court will not reverse the Bankruptcy Court's decision unless that court abused its sound discretion. *In re Jones Truck Lines, Inc.*, 63 F.3d 685, 686 (8th Cir. 1995). "Abuse of discretion will be found only when the . . . court's decision is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Richards v. Aramark Services, Inc.*, 108 F.3d 925, 927 (8th Cir. 1997) (citation omitted). Generally, a discretionary decision will not be reversed if the decision "remains within 'the range of choice' available to the . . . court, accounts for all relevant factors, does not rely on any irrelevant factors, and does not constitute a 'clear error of judgment.' " *Walser v. Toyota Motor Sales, U.S.A., Inc.*, 43 F.3d 396, 401 (8th Cir. 1994) (quoting *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984)).

Magna contends that the Bankruptcy Court's decision to permit the Hartford surcharge was a clear error of

judgment. This Court disagrees. Magna does not contest the Bankruptcy Court's factual findings that (i) Magna stood to benefit the most from a successful reorganization of the Debtor; (ii) the Debtor's attempted reorganization was primarily for the benefit of Magna; (iii) Magna was the primary beneficiary of the Debtor's continued operations; and (iv) the cost of the worker's compensation insurance was a reasonable and necessary expense of continuing the business. Under these circumstances, it is not an abuse of discretion to require Magna to bear the reasonable and necessary expense of insurance coverage the Debtor was required to carry by state law.

Therefore, the Court concludes the Bankruptcy Court did not abuse its discretion in holding that Hartford could surcharge Magna's collateral under 11 U.S.C. § 506(c) for worker's compensation insurance premiums.

4. *Final Debtor In Possession Order*. Finally, Magna argues that the Bankruptcy Court erred in allowing Hartford to surcharge Magna's collateral under § 506(c), after the Court previously entering a final order pursuant to 11 U.S.C. § 364(c) and (d) which explicitly prohibited the imposition of any administrative expense charges against Magna's collateral without Magna's prior written consent.[2]

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2. *See* Final Order Authorizing Debtor to Obtain Post-Petition Secured Credit, Granting Senior Liens and Administrative Priority Expense, Modifying Automatic Stay, Providing Adequate Protection and Authorizing Agreements with Landmark Bank of Illinois, dated October 25, 1991 (the "Final DIP Order"). Paragraph 33 of the Final DIP Order states,

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Magna argues that (i) under 11 U.S.C. § 364(e), a bankruptcy court cannot modify or alter its own postpetition financing order; (ii) Magna had a right to rely on the enforceability of the Final DIP Order; and (iii) by permitting Hartford to recover under § 506(c), the Bankruptcy Court deprived Magna of its protections under the Final DIP Order, and effectively modified the Order. Magna relies primarily on the Seventh Circuit's decision in *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1355 (7th Cir. 1990) ("*Kham & Nate's*") for the proposition that a postpetition financing order cannot be modified by a bankruptcy court, even if it was erroneous or illegal when entered.[3]

The Bankruptcy Court's determination that Magna was not entitled to the protection of § 364(e) derives from its interpretation of the 8th Circuit's *Boatmen's* decision. The Bankruptcy Court found the pertinent inquiry in determining

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> 33. Except for the Carve-Out [$10,000.00 for professional fees], no expenses of administration of Debtor's Chapter 11 case or any future proceeding which may develop out of such case, including liquidation in bankruptcy or other proceeding under the Bankruptcy Code, shall be charged against [Magna] or the Collateral, without the prior written consent of [Magna], and no such consent shall ever be implied from any action, inaction or acquiescence by [Magna].

3. The language of 11 U.S.C. § 364(e) is limited to reversal or modifications of orders on appeal. For purposes of this motion, the Court assumes without deciding that § 364(e) applies to a bankruptcy court's modification of its own orders.

whether a charge should be imposed under § 506(c) is whether the secured creditor agreed to the continuation of the Debtor's business with the hope that the continuation would allow the creditor to recover more than it would in a liquidation. Record on Appeal at 29, p. 10. The Court stated the Final DIP Order provision was "not relevant to the inquiry", *id.*, and noted further, "A secured creditor who is willing to benefit from a successful reorganization may not circumvent its responsibility to pay for necessary expenses with the use of disclaimers such as the one used in Paragraph 33 of the Final [DIP] Order." *Id.*, pp. 9-10.

The parties have not cited any authority from the Eighth Circuit concerning the effect of 11 U.S.C. § 364(e) on a claim for a surcharge of administrative expenses under § 506(c), and the Court has found none in independent research. Some authority exists in other jurisdictions that provisions in postpetition financing orders which prohibit the payment of § 506(c) administrative expenses from secured collateral are unenforceable. *See, e.g., In re Willingham Invs., Inc.*, 203 B.R. 75, 79 (Bankr. M.D. Tenn 1996) (vacating portion of a postpetition cash collateral order which attempted to prohibit payment of administrative expenses from the secured creditor's collateral, where the continuation of the debtor's business in Chapter 11 occurred primarily for the benefit of the undersecured creditor); *McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (Bankr. W.D. Mich. 1991) (refusing to enforce provision of cash collateral order attempting to immunize secured creditor from any surcharge payment obligations under 11 U.S.C. § 506(c) "in light of the congressional mandate that a trustee have the authority to use a portion of secured collateral for its

preservation or proper disposal"); *see also* Stephen A. Stripp, *Balancing of Interests in Orders Authorizing Use of Cash Collateral in Chapter 11*, 21 Seton Hall L. Rev. 562, 578-79 (1991) (noting that while many cash collateral orders operate to prohibit claims under § 506(c), debtors, who are parties to the order, should not be permitted to waive the rights of other potential claimants).

The Court finds these authorities persuasive. As discussed more fully above, the Debtor's attempted reorganization was primarily for the benefit of Magna, Magna was the primary beneficiary of the Debtor's continued operations, and the cost of the workers' compensation insurance was a reasonable and necessary expense of continuing the Debtor's business. Under these circumstances, to permit Magna and the Debtor to agree between themselves that the expense of mandatory workers' compensation insurance may not be charged against Magna's collateral would be inequitable and would constitute a windfall for Magna at Hartford's expense.

In the alternative, the Court also concludes the Final DIP Order provision is unenforceable against Hartford based on due process considerations. It is undisputed that Hartford did not know Debtor had filed for bankruptcy protection until 1993. Hartford had no notice of the proceedings which led up to issuance of the Final DIP Order in October 1991, was not a party to the Order, and was not served with the Order. While notice of the Final DIP Order was given to the twenty largest unsecured creditors in accordance with Federal Rule of Bankruptcy Procedure 4001(c)(1) and (d)(1), only the Debtor and Magna's predecessor in interest were signatories to the Order.

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It is true that a creditor must be able to rely on a bankruptcy court's financing order. Nonetheless, the rationale of the *Kham & Nate's* decision cited by Magna has been held not to apply where a debtor and lender ignore the due process rights of third parties. *See In re Marrs-Winn Co., Inc.*, 103 F.3d 584, 595 (7th Cir. 1996); *In re Tek-Aids Indus., Inc.*, 145 B.R. 253, 258-59 (Bankr. N.D. Ill. 1992); *In re Visual Indus., Inc.*, No. 94-3414, slip op. at 12 n.6 (D.N.J. Sept. 26, 1994). Because Hartford had no notice of the Final DIP Order and no opportunity to challenge it, the Court concludes the Order's provision prohibiting the charge of any administrative expense against Magna's collateral without its consent is not enforceable against Hartford.

For these reasons, the Court concludes the Bankruptcy Court did not err in holding that Paragraph 33 of the Final DIP Order does not preclude the imposition of a surcharge against Magna's collateral under 11 U.S.C. § 506(c).

Conclusion.

For the foregoing reasons, the Court concludes that the judgment of the Bankruptcy Court should be affirmed. An appropriate judgment will accompany this memorandum.

s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES DISTRICT
JUDGE

Dated this 10th day of September, 1997.

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION DATED AUGUST 14, 1996

UNITED STATES BANKRUPTCY COURT
EASTERN DIVISION OF MISSOURI
EASTERN DIVISION

Case No. 91-45623-293
Chapter 7

In re

HEN HOUSE INTERSTATE, INC.,

Debtor.

HARTFORD UNDERWRITERS
INSURANCE COMPANY,

Movant,

– v –

MAGNA BANK OF ILLINOIS,

Respondent.

Motion No. 463

MEMORANDUM OPINION

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JURISDICTION

This Court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. §§ 1334, 151, and 157 and Local Rule 29 of the United States District Court for the Eastern District of Missouri. This is a "core proceeding" pursuant to 28 U.S.C. §157(b)(2)(A), which the Court may hear and determine.

PROCEDURAL BACKGROUND

1. On September 5, 1991, Hen House Interstate, Inc. (Debtor), filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. On October 25, 1991, the Court entered its Final Order Authorizing Debtor to Obtain Post-Petition Secured Credit, Granting Senior Liens and Administrative Priority Expense, Modifying Automatic Stay, Providing Adequate Protection and Authorizing Agreements with Landmark Bank of Illinois (the Final Order).[1]

2. After the issuance of the Final Order, Magna Bank of Illinois provided this Debtor with debtor-in-possession financing in the amount of $300,000 and allowed the Debtor to use Magna's cash collateral.

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1. When the Final Order was entered, Landmark Bank of Illinois extended financing to the Debtor. Later, Magna Bank of Illinois succeeded to the interest of Landmark Bank of Illinois. For convenience, reference is made to Magna throughout this opinion, notwithstanding that certain facts pertain to Landmark Bank prior to its acquisition by Magna.

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3. On January 20, 1993, this case was converted to a Chapter 7 proceeding. The Court appointed Robert J. Blackwell to serve as trustee of the Chapter 7 estate.

4. On June 29, 1993, Hartford Underwriters Insurance Company (Hartford) filed an Application for Allowance of Administrative Expense Pursuant to 11 U.S.C. § 503 and Charge Against Collateral Pursuant to 11 U.S.C. § 506(c) (the Hartford Application). In the Hartford Application, Hartford asked the Court to authorize it to employ section 506(c) and recover the unpaid workers' compensation premiums Debtor owed it for coverage provided post-petition from property securing Magna's claim. Magna objected to the Hartford Application.

5. Magna argues that the Court should deny the Hartford Application for the following reasons:

1. The Court cannot modify or ignore provisions in the Final Order specifically prohibiting the type of relief requested in the Hartford Application.

2. The equities in this case weigh against allowing Hartford to charge Magna's collateral with the remaining outstanding balance on the Debtor's workers' compensation insurance premiums.

3. Hartford's claim for unpaid workers' compensation does not satisfy the narrow standard for recovery under section 506(c) enunciated by the Eighth Circuit in *Brookfield Production Credit Association v. Borron*, 738 F.2d 951 (8th Cir. 1984),

which Magna maintains remains in existence and applies to this case, notwithstanding the broad section 506(c) standard used by the Eighth Circuit in *I.R.S. v. Boatmen's First National Bank of Kansas City*, (hereinafter *Boatmen's*) 5 F.3d 1157 (8th Cir. 1993).

In response, Hartford argues that:

1. The provisions of the Final Order should not apply to Hartford because it was not aware of the Debtor's bankruptcy proceedings until March of 1993 and did not receive actual notice of the Final Order's entry.

2. The equities of the case favor Hartford.

3. The broad standard for recovery under section 506(c) used by the Eighth Circuit in the *Boatmen's* decision applies to this case and has been satisfied by Hartford.

6. The Court conducted an evidentiary hearing. The evidence consisted of a Trial Stipulation of Facts agreed upon and submitted jointly by Hartford and Magna and four exhibits consisting of (i) the Debtor's Emergency Motion for Order Authorizing Debtor to Obtain Post-Petition Financing Pursuant to 11 U.S.C. 364, and Granting Adequate Protection to Pre-Petition Secured Party; (ii) the Emergency Order entered by the Court on September 6, 1991, authorizing the debtor-in-possession financing on an emergency basis; (iii) the Final Order; and (iv) the transcript, together with all

exhibits thereto, including the deposition of Mary Zuk, Hartford's designated representative, who testified on Hartford's behalf. No other evidence was adduced at trial.

JOINT STIPULATION OF FACTS

The parties stipulated to the following facts as true:

1. Hen House filed Chapter 11 proceedings on September 5, 1991.

2. Hartford provided workers' compensation insurance coverage for the Debtor for the period from September 1, 1991, through September 1, 1992. The Debtor was required to carry insurance during that period.

3. The Debtor previously paid premiums totaling $82,294 to Hartford on account of the insurance

4. Hartford claims that it still is owed $51,871.40 for the insurance premiums for the post-petition period during which the Insurance was in force. Magna has no evidence to the contrary with respect to the amount outstanding.

5. Hartford has paid losses on worker's compensation claims made under the insurance totaling $32,551. In addition, Hartford presently has reserved, but has not been paid, $38,549 on account of potential losses. As of August 1993, the amount held in reserve on account of potential losses was $20,821. The total amount of losses actually paid by Hartford under the insurance increased by $179 from August of 1993 to April 5, 1994. No further claims were made as of September 1992.

6. In making the post-petition debtor-in-possession loan to the Debtor, Magna anticipated that it, as well as the Debtor's other creditors, would receive a greater return through a Chapter 11 filing in which the Debtor's operations would continue in hope of reorganization, rather than from an immediate liquidation of the Debtor's property outside of Chapter 11.

7. When the Debtor filed a petition under Chapter 11 on September 5, 1991, the Debtor anticipated that it would continue its operations and reorganize its business. The reorganization prospects did not materialize and sometime in 1992, the Debtor liquidated its assets through a combination of going-concern sales and sales of shut-down properties.

8. As of September 5, 1991, the Debtor owed Magna approximately $4 million.

9. Magna has not received the full amount owed to it by the Debtor. Magna has lost approximately $1,500,000 in principal, plus additional amounts for unpaid interest and attorneys fees and expenses.

10. Magna previously disbursed to the Debtor the full $300,000 available under the post-petition debtor-in-possession loan it made to the Debtor.

11. Hartford was not aware of the Debtor's bankruptcy proceedings until March of 1993.

The Court accepts and adopts those facts set forth in the above Joint Stipulation of Facts along with the following findings as the Court's findings of fact:

Paragraph 33 of the Final Order provided the following express prohibition against charging Magna or its collateral with administrative expenses under section 506(c) of the Bankruptcy Code. The Final Order stated:

> 33. Except for the Carve-Out [$10,000 for professional fees], no expenses of administration of Debtor's Chapter 11 case or any future proceeding which may develop out of such case, including liquidation in bankruptcy or other proceeding under the Bankruptcy Code, shall be charged against Landmark or the Collateral, whether pursuant to 506(c) of the Bankruptcy Code or otherwise, without the prior written consent of Landmark, and no such consent shall ever be implied from any action, inaction or acquiescence by Landmark.

DISCUSSION

The issues in the present case are: 1) whether Hartford, an administrative claimant who provided workers' compensation insurance post-petition for the Debtor, has standing to recover those expenses under 11 U.S.C. § 506(c); and 2) whether payment of workers' compensation insurance is a reasonable and necessary expense for preserving or disposing of the Debtor's bankruptcy estate.[2] Magna, the

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2. The Court notes that, initially, Hartford's standing to bring suit under § 506(c) was challenged, *see* Objection of Magna Bank of Illinois to Hartford Underwriters Insurance Company Application for Allowance of Administrative Expense Pursuant to 11 U.S.C.

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secured creditor, stipulates to the fact that it agreed to the continued operation of the business post-petition.

The bankruptcy estate generally must pay administrative expenses out of the unencumbered assets of the debtor. *Boatmen's*, 5 F.3d 1157, 1159 (8th Cir. 1993). In most instances, it cannot charge those expenses to the secured creditors against their collateral pursuant to section 503. An exception to that rule exist under section 506(c). Section 506(c) states, "[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of the claim." The section was intended to prevent the secured creditor from benefitting at the expense of the trustee or debtor in possession. It applies in situations where an estate

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Section 506(c), but at the hearing held on this matter, Magna conceded that under the Eighth Circuit's *Boatmen's* decision, Hartford has standing. The majority of the Circuits which have published opinions on this issue have read section 506(c) broadly enough to permit administrative claimants standing to recover. *See Boatmen's*, 5 F.3d at 1159; *North County Jeep and Renault, Inc. v. Gen. Elec. Credit Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229 (9th Cir. 1991), *cert. denied*, 506 U.S. 821, 113 S.Ct. 71 (1992); *In re Parque Forestal, Inc.*, 949 F.2d 504 (1st Cir. 1991); *New Orleans Pub. Serv. Inc. v. First Fed. Sav. and Loan Ass'n. (In re Delta Towers, Ltd.)*, 924 F.2d 74 (5th Cir. 1991); *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91 (3d Cir. 1986). *Contra Ford Motor Credit Co. v. Reynolds & Reynolds Corp. (In re JKJ Chevrolet)*, 26 F.3d 481, 486 (4th Cir. 1994) (holding that only trustee has standing to bring suit under section 506(c)).

continues to operate primarily for the benefit of the secured creditor.

In *Boatmen's* the Court required Boatmen's, a secured creditor, to pay post-petition payroll taxes as costs of preserving the debtor as a going concern. *Id.* The case involved a company that owned and operated a string of dry cleaning stores. *Id.* at 1158. When the company filed for bankruptcy, the secured creditor, Boatmen's, agreed to extend credit to debtor post-petition so that it could continue operating and sell its business as a going concern. *Id.* at 1160. It did so with the experience of receiving a higher return on its investment from the sale of a going concern rather than a liquidation sale. *Id.* In fact, more than half of the debtor's stores were sold as going concerns. *Id.* at 1158-59. The Court explained its holding, "[t]he creditor, however, in the expectation of an overall benefit, agreed to accept the expenses and risks associated with that anticipated benefit. One of those expenses was payroll taxes, and one of the risks was nonpayment of the taxes and its consequences." *Id.* The Court viewed the unpaid taxes as a de facto loan from the government without which the estate could not have continued operations. *Id.* The creditor in Boatmen's agreed to accept the risk of continuing operations and the risk paid off. Boatmen's received a greater return on its investment than it would have in a liquidation.

The *Boatmen's* court frequently cited *United States v. Annett Ford, Inc. (In re Annett Ford)*, 64 B.R. 946 (D. Neb. 1986). The *Annett Ford* court addressed the same issues as the *Boatmen's* court but the secured creditor in *Annett Ford* was less fortunate than the secured creditor in *Boatmen's*.

Despite the fact that the continued operation of the business did not prove successful, the *Annett Ford* court found, "[t]he preservation of the going concern value of a business can constitute a benefit to a secured creditor under 11 U.S.C. § 506(c)." *Id.* at 947. The *Boatmen's* court adopted the *Annett Ford* court's analysis and did not limit its holding to recovery for administrative claimants who receive overall financial benefit. *Boatmen's*, 5 F.3d at 1160.

The *Boatmen's* and *Annett Ford* courts based their holdings on the theory that when a creditor agrees to the continued operation of a debtor's business, it also agrees to accept the risks associated with the potential benefit it seeks. Administrative claims such as unpaid payroll taxes and penalties are a foreseeable risk.

Although facts in the present case are similar to those in *Boatmen's*, they are more like the facts in *Annett Ford*. The secured creditor, Magna, agreed to the continued operation of Debtor's business under a Chapter 11 plan of reorganization. Virtually all real and personal property of the Debtor was encumbered by and subject to Magna's first priority perfected lien. Magna stood to benefit the most from a successful reorganization. When Magna agreed to the continuing operation of the Debtor, it openly expressed its hopes of receiving an increase on its return. In so agreeing, Magna implicitly agreed to accept the risks associated with the hoped for benefit. Under Missouri workers' compensation laws, an operating business is obligated to maintain workers' compensation insurance unless it can demonstrate that it has the ability, alone or in a group, to self-insure itself. See Mo. Rev. Stat. § 287.280 (1994). Thus, the cost of the insurance

Hartford provided was a reasonable, necessary and foreseeable expense of continuing this business operations. Unfortunately for Magna, the risk did not produce the desired results, and the continued operation of the business failed to improve its recovery. However, this does not preclude the administrative claimant from recovering. A secured creditor who is willing to benefit from a successful reorganization may not circumvent its responsibility to pay for necessary expenses with the use of disclaimers such as the one used in Paragraph 33 of the Final Order.

In its brief to the Court, Magna makes three arguments against allowing Hartford to collect its claim from Magna's collateral. First, Magna argues that this Court cannot modify or ignore Paragraph 33 of the Final Order which prohibits charging Magna's collateral for post-petition administrative expenses. It argues that: 1) to do so would discourage creditors from making post-petition loans; 2) Magna loaned the money in reliance on the language in Paragraph 33; and 3) Hartford did not know about the bankruptcy proceeding until after it extended the credit and could not have done so in reliance on rights under section 506(c). Magna misunderstands the holding in *Boatmen's*. The pertinent question under section 506(c) is whether the secured creditor agreed to the continuing operation of the business with the hope that the continuation would allow it to recover more than it would have in a liquidation. If it did, then according to the Eighth Circuit, along with the potential for benefit, it accepted the risk of foreseeable costs and expenses of preserving the business. Paragraph 33 is not relevant to the inquiry. An administrative claimant has standing under section 506(c) if it extends reasonable and necessary services

to the debtor. Furthermore, the administrative claimant is not required to show reliance on section 506.

Second, Magna argues that equities in the case weigh against allowing Hartford to charge Magna's collateral. The Court disagrees. Equities do not permit Magna to receive a windfall at the expense of the Debtor or the estate's administrative claimants. Because the attempt to reorganize was primarily for the benefit of Magna, Magna must pay the costs.

Third, Magna attempts to distinguish the facts in the present case from *Boatmen's* and asks the Court to apply the stricter standard for recovery under section 506(c) enunciated in an earlier Eighth Circuit case, *Brookfield Prod. Credit Ass'n. v. Borron*, 738 F.2d 951 (8th Cir. 1984). Magna's reliance on *Borron* is misplaced. The *Borron* case involved Debtors who used the proceeds from the sale of the secured creditor's collateral to pay other creditors. The Circuit Court held that the Debtors, not the secured creditor, benefitted from the continued operation of the business and it refused to charge the secured creditor for administrative expenses. The facts in the present case are distinguishable from those in *Borron*. The primary beneficiary of Hen House's continued operation was Magna and the payment of workers' compensation insurance was an expense necessary to Hen House's continued operation. The extension of insurance coverage was a benefit to the secured creditor who would not have had the opportunity to attempt greater recovery without it. Workers' compensation insurance or a demonstrated ability to self-insure one's potential liability, like taxes, is required by law in Missouri. Unlike the *Borron*

debtor, Hen House did not take proceeds from Magna's collateral and use it to pay its unsecured creditors.

The Court holds that Magna, a secured creditor who agreed to the preservation of the debtor's business as a going concern, shall be charged with the payment of post-petition workers' compensation premiums under 11 U.S.C. § 506(c) as reasonable and necessary expenses.

An Order consistent with this Memorandum Opinion will be entered this date.

s/ David P. McDonald
DAVID P. McDONALD
U. S. Bankruptcy Judge

DATED: August 14, 1996
St. Louis, Missouri

Appendix D

UNITED STATES BANKRUPTCY COURT
EASTERN DIVISION OF MISSOURI
EASTERN DIVISION

Case No. 91-45623-293
Chapter 7

In re

HEN HOUSE INTERSTATE, INC.,

Debtor.

HARTFORD UNDERWRITERS
INSURANCE COMPANY,

Movant,

– v –

MAGNA BANK OF ILLINOIS,

Respondent.

Motion No. 463

ORDER

For the reasons set forth in the Memorandum Opinion filed this date, it is

Appendix D

ORDERED THAT Magna Bank of Illinois, a secured creditor who agreed to the preservation of the debtor's business as a going concern, shall be charged with the payment of post-petition workers' compensation premiums under 11 U.S.C. § 506(c) as reasonable and necessary expenses.

s/ David P. McDonald
DAVID P. McDONALD
U. S. Bankruptcy Judge

Dated: August 14, 1996
St. Louis, Missouri

APPENDIX E — RELEVANT STATUTES

11 U.S.C. § 503

§ 503. Allowance of administrative expenses.

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including

(1)(A) the actual, necessary costs and expenses of its preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case:

(B) any tax —

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by —

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title; and

(6) the fees and mileage payable under chapter 119 of title 28.

* * *

11 U.S.C. § 506

§ 506. Determination of secured status.

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the

amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless —

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

* * *

Appendix E

11 U.S.C. § 1109

§ 1109. Right to be heard.

(a) The Securities and Exchange Commission may raise and may appear and be heard on any issue in a case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the case.

(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

* * *

Supreme Court, U.S.
FILED
OCT 8 1999
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No. 99-409

IN THE
Supreme Court of the United States

HARTFORD UNDERWRITERS INSURANCE COMPANY,
Petitioner,

v.

UNION PLANTERS NATIONAL BANK, successor in interest by merger to MAGNA BANK, N.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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2418

QUESTION PRESENTED FOR REVIEW

Does Section 506(c) of the Bankruptcy Code (11 U.S.C. § 506(c)) create a remedy in favor of certain, unpaid administrative claimants that entitles such claimants to recover their unpaid administrative expenses from the collateral of a secured creditor?

STATEMENT PURSUANT TO RULE 29.6

Respondent Union Planters National Bank is the successor in interest due to merger, effective as of October 9, 1998, to Magna Bank, N.A. Union Planters National Bank is a wholly-owned subsidiary of Union Planters Corporation, a publicly-traded corporation. No publicly held company owns 10% or more of Union Planters Corporation's stock.

Although the briefs filed with the court below and the decision below * refer to Respondent as "Magna," Respondent is referred to herein as "Union Planters" or "Respondent."

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* *See In re Hen House Interstate, Inc.*, 177 F.3d 719, 720, n. 2 (8th Cir. 1999) (en banc).

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IN THE

Supreme Court of the United States

No. 99-409

HARTFORD UNDERWRITERS INSURANCE COMPANY,
Petitioner,

v.

UNION PLANTERS NATIONAL BANK, successor in interest by merger to MAGNA BANK, N.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES OR OTHER PROVISIONS INVOLVED

Respondent submits that the only statute or provision that is presently at issue in this case is 11 U.S.C. § 506(c) (authorizing a bankruptcy trustee to "surcharge" a secured creditor's collateral for certain necessary and beneficial expenses).

STATEMENT OF THE CASE

For its statement of the case, Respondent hereby adopts and incorporates herein by reference the description of the case set forth in "Section I" of the decision below. *See In re Hen House Interstate, Inc.*, 177 F.3d 719, 720-721 (8th Cir. 1999) (*en banc*).

REASONS FOR DENYING PETITION

I. UNION PLANTERS RESPECTFULLY SUBMITS THAT THE DECISION BELOW REFLECTS A GROWING CONSENSUS THAT OLDER CASE LAW ALLOWING THIRD PARTY CLAIMANTS TO PURSUE RECOVERIES UNDER 11 U.S.C. § 506(c) IS INCONSISTENT WITH THE PLAIN MEANING RULE AND OTHERWISE WRONGLY DECIDED

As Hartford correctly observes, at the present time, there is no uniformity among all of the Circuits on the question of whether third parties such as Hartford may "surcharge" a secured creditor's collateral under the provisions of 11 U.S.C. § 506(c). Respondent suggests, however, that there is a growing consensus as reflected in the two most recent Circuit Court decisions, other lower federal court decisions, and the collective writings of several bankruptcy scholars and commentators that the older line of cases allowing third parties to pursue such recoveries is patently at odds with the "plain meaning" rule and otherwise wrongly decided. The decision below—wherein the Eighth Circuit Court of Appeals, sitting *en banc*, expressly overturned prior Circuit precedent allowing third parties to seek relief under Section 506(c)—represents a substantial and decisive step toward the complete demise of the older line of cases and an ultimate universal recognition that Section 506(c) should and must be construed in accordance with its plain and unambiguous terms. Given the evolving state of Circuit Court jurisprudence on this issue, Union Planters respectfully submits that the granting of certiorari in this case is neither necessary nor appropriate.

Under its express terms, Bankruptcy Code Section 506(c) provides that "[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." 11 U.S.C. § 506(c). As the court below correctly observed, "[t]he natural reading of § 506(c) entitles only the trustee to seek to surcharge property securing the claim of an allowed secured creditor under that section." *See In re Hen House Interstate, Inc.*, 177 F.3d 719, 722 (8th Cir. 1999) (*en banc*).

Notwithstanding the natural reading of this language, in *In re McKeesport Steel Castings Co.*, 799 F.2d 91 (3rd Cir. 1986), the Third Circuit Court of Appeals held that a third party claimant such as Hartford could surcharge a secured creditor's collateral under Section 506(c). In reaching this result, the Third Circuit did not "examine the plain language of the statute or the case law that requires adherence to its plain terms." J. Galton and F. McGovern, Jr., *Standing Under Section 506(c) of the Bankruptcy Code Reexamined*, 99 Com. L.J. 464, 467 (Winter 1994). Indeed, the *McKeesport* court focused on certain, perceived equitable and policy considerations and, on the basis of those considerations, concluded that third parties should be allowed to proceed under Section 506(c). *See McKeesport*, 799 F.2d at 93-4.

McKeesport was the first Circuit Court decision addressing the issue whether third party claimants may pursue recoveries under Section 506(e). Following the *McKeesport* decision, four other Circuits (originally including the Eighth Circuit) joined the Third Circuit in concluding that third parties should be allowed to seek relief under this Section. *See In re Parque Forestal*, 949 F.2d 504 (1st Cir. 1991); *New Orleans Public Service, Inc. v. First Federal Savings and Loan Associations of Warner Robins, Georgia (Matter of Delta Towers, Ltd.)*, 924 F.2d 74, 77-78 (5th Cir. 1991); *IRS v. Boatmen's First National Bank of Kansas City*, 5 F.3d 1157 (8th Cir. 1993); *In re Palomar Truck Corporation*, 951 F.2d 229 (9th Cir.

1992) *cert. denied sub nom. General Electric Capital Corporation v. North County Jeep & Renault, Inc.*, 506 U.S. 821, 113 S.Ct. 71 (1992). In adopting this position, the latter courts "essentially relied on *In re McKeesport* with little analysis except to note that denying standing to an administrative claimant would allow a secured creditor to reap a windfall, an inequitable result." *Ford Motor Credit Company v. Reynolds & Reynolds Company (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 485 (4th Cir. 1994). As one commentator observed, the other Circuits following the Third Circuit's holding offered "no greater discussion or analysis than *McKeesport* in reaching the conclusion that an administrative claimant has standing under [Section 506(c)] to asset a surcharge motion. These courts do not address the purpose of [Section 506(c)], whether a broad construction of [Section 506(c)] would violate other goals of Title 11 or why the unambiguous language of the [Section 506(c)] should not be followed." P. Campsen, *Standing Under 11 U.S.C. § 506(c)*, 5 Norton Bankruptcy Law Advisor 5, 8 (May 1995).

As the *McKeesport* line of cases was developing, this Court rendered of a series of decisions in which it emphatically reiterated the importance of interpreting and applying the Bankruptcy Code in accordance with its plain meaning. *See, e.g., Patterson v. Shumate*, 504 U.S. 753, 761, 112 S.Ct. 2242, 2248 (1992); *Toibb v. Radloff*, 501 U.S. 157, 164, 111 S.Ct. 2197, 2201 (1991). Indeed, this Court repeatedly stressed that where the Bankruptcy Code is clear and unambiguous, "the sole function of the courts is to enforce it according to its terms." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030 (1989); *Rake v. Wade*, 508 U.S. 464, 471, 113 S.Ct. 2187, 2191 (1993).

Acknowledging and adhering to the foregoing principles, the Fourth Circuit in *Ford Motor Credit Company v. Reynolds & Reynolds Company (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481 (4th Cir. 1994) broke from *McKeesport* and its progeny and held that under its clear and unambiguous terms, Section 506(c) only authorizes a trustee (and, by operation of 11 U.S.C. § 1107, a Chapter 11 debtor-in-possession) to surcharge a secured creditor's collateral. Not only did the Fourth Circuit conclude that this holding was mandated by the plain meaning rule but also found that it was entirely "consistent with a fundamental purpose of the Bankruptcy Code—equitable distribution to similarly situated creditors." *JKJ Chevrolet*, 26 F.3d at 484. Specifically, the Fourth Circuit observed that the *McKeesport* line of cases essentially allows third party claimants such as Hartford to circumvent the Bankruptcy Code's carefully crafted priority scheme, "potentially causing an inequitable division of the [bankruptcy] estate." *Id.*, at 484. Moreover, the Fourth Circuit observed that the perceived equitable concerns underlying the *McKeesport* line of cases were ultimately based upon erroneous and mistaken assumptions. *Id.*, 484-486.

Although earlier bankruptcy and district court decisions had refused to follow the *McKeesport* line of cases on similar or identical grounds, Union Planters submits that the *JKJ Chevrolet* decision signaled a turning point in the prevailing views toward the permissibility of allowing third parties to seek relief under Section 506(c). Thus, following the *JKJ Chevrolet* decision, several courts in those Circuits where there is no controlling precedent to the contrary have held that only a bankruptcy trustee (or, by operation of 11 U.S.C. § 1107, a Chapter 11 debtor-in-possession) may seek relief under Section 506(c). *See, e.g., Matter of Blufftton Castings Corporation*, 224 B.R. 902, 903 (Bankr. N.D. Ind. 1998); *Ambassador Factors v. First American Bulk Carrier Corporation (Matter of*

Topgallant Lines, Inc.), 208 B.R. 584, 586 (Bankr. S.D. Ga. 1996). Similarly, a number of bankruptcy scholars and commentators writing after the *JKJ Chevrolet* decision consistently have rejected the *McKeesport* line of cases in favor of an approach more consistent with that of the Fourth Circuit. *See, e.g.*, L. Snider and K. Noble, *Standing to Surcharge the Secured Creditor: Policy, Plain Meaning, and Payment Under Section 506(c) of the Bankruptcy Code*, 5 J. Bankr. L. & Prac., 301, 308-9 (March/April 1996); G. Hesse, *One Statute, Three Disparate Interpretations: Standing to Pursue Recovery From A Secured Creditor Pursuant to Bankruptcy Code Section 506(c)*, 47 Baylor L. Rev. 39, 54-8 (Winter 1995); P. Campsen, *Standing Under 11 U.S.C. § 506(c)*, 5 Norton Bankruptcy Law Advisor 5, 8 (May 1995); J. Galton and F. McGovern, Jr., *Standing Under Section 506(c) of the Bankruptcy Code Reexamined*, 99 Com. L.J. 464, 472-475 (Winter 1994).

With the Eighth Circuit's *en banc* decision below (which is the only reported Circuit Court *en banc* decision on the subject), the shift in prevailing thinking sparked by the *JKJ Chevrolet* decision has now taken on a new force and dimension. Indeed, given the Eighth Circuit's express renunciation of its previous adoption of the *McKeesport* decision, Respondent submits that other Circuits that once adhered to *McKeesport* will be compelled to reconsider their previous holdings and will likewise conclude that these decisions were not soundly reasoned, but rather inescapably in conflict with the plain meaning rule. Thus, in no sense can the current "split" among the Circuits on the issue whether third party claimants may seek recovery under Section 506(c) be considered a static and intractable deadlock that will remain hopelessly unresolved unless this Court intervenes. On the contrary, the current state of jurisprudence on this issue is clearly an evolving one that should ultimately result in a consistent and uniform interpretation of Section 506(c) in accordance with its plain and unambiguous terms.

Given the foregoing, this Court's review of the decision below clearly would seem unwarranted. *See Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387, 393, 43 S.Ct. 422, 423-4 (1923) (emphasis added) (writ of certiorari should not be granted except in cases of significant public importance and "where there is *a real and embarrassing* conflict of opinion and authority between the Circuit Court of Appeals."). Indeed, beyond hastening the complete demise of the *McKeesport* line of cases, review of the decision below would not appear to provide this Court with a meaningful opportunity to advance the development of bankruptcy jurisprudence other than to, perhaps, remind lower courts (once again) that where the provisions of the Bankruptcy Code are plain and unambiguous, the role of the judiciary is to apply those provisions according to their terms. As more fully described above, the latter principle is one that several lower courts already have begun to recognize and apply to Section 506(c).

II. HARTFORD'S CONTENTION THAT THE DECISION BELOW VIOLATES ESTABLISHED PRINCIPLES OF STANDING IS BASED UPON A FUNDAMENTAL MISUNDERSTANDING REGARDING THE APPLICABILITY OF THESE PRINCIPLES TO THE CASE

Hartford further insists that a writ of certiorari must be granted in this case because the decision below violates established principles of "standing" as recognized and articulated by this Court. While it is true that many courts (including the court below) and commentators have conveniently used the term "standing" when describing the issue of whether third party claimants such as

Hartford may surcharge a secured creditor's collateral under Section 506(c), this loose characterization can be misleading. Indeed, the ultimate issue is not one of standing in the most traditional usage but rather whether Congress intended for Section 506(c) to provide third party claimants such as Hartford with a "cause of action" or remedy against a secured creditor and/or its collateral. Accordingly, it is evident that Hartford's attempt to invoke the doctrine of "prudential standing" to persuade this Court to review the decision below is ill-founded and mistaken.

As this Court has repeatedly recognized, there is a profound and fundamental distinction between the concepts of standing and whether a party has a cause of action or remedy under a particular federal statute. *See, e.g., Steel Company v. Citizens For A Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 1010 (1998) (courts must resolve questions of standing before considering whether plaintiff has a cause of action); *Davis v. Passman*, 442 U.S. 228, 239, n.18, 99 S.Ct. 2264, 2274, n.18 (1979) (distinguishing concepts of "jurisdiction," "standing," "cause of action," and "relief."). Specifically, standing in the most commonly used sense concerns whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731, 92 S.Ct. 1361, 1364 (1972). Thus, the law of standing requires that a party bringing an action have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 804, 105 S.Ct. 2965, 2965, 2970 (1985).

In contrast, the question whether a party has a cause of action under a particular federal statute is one of statu-

tory construction in which the court must determine whether Congress intended to create a remedy in favor of such a party. As this Court stated in *Karaholios v. National Federation of Federal Employees, Local 1263*, 489 U.S. 527, 532, 109 S.Ct. 1282, 1286 (1989) (citations omitted), the question of whether a party has a private cause of action under a statute "poses an issue of statutory construction . . . . Unless such congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential implication of a private remedy simply does not exist." Thus, "[t]he focus of cause of action inquiry must not be confused with standing—it does not go to the quality or extent of the plaintiff's injury, but to the nature of the right asserted." 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 3531.6 at 500 (1984).

The more traditional and common questions of standing most often arise in connection with "challenges to government conduct, where the litigants often lack the obvious stake normally present in most lawsuits between private parties[.]" L. Tribe, *American Constitutional Law*, § 3-14 at 104 (2nd Ed. 1988). As one noted scholar observed, "[t]he law of standing is almost exclusively concerned with such public-law questions as determinations of constitutionality and review of administrative or other governmental action." C. Wright, *Law of Federal Courts*, § 13 at 68 (5th Ed. 1994). Thus, for instance, in *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154 (1997)—a case cited and heavily relied upon by Hartford in its Petition—the Court considered whether a group of ranchers and irrigation districts had standing to chalienge certain actions taken by the U.S. Secretary of the Interior and certain members of the Federal Fish and Wildlife Service. Similarly, in *Association of Data Processing*

Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827 (1970)—another case that Hartford relies upon to attack the decision below—the Court addressed the issue of whether certain data processing companies had "standing" to challenge a ruling by the Comptroller of Currency.

In actions between private parties that—as in the present case—essentially involve a demand for monetary relief, the more traditional issue of standing rarely arises. Specifically, in such cases, there is normally no question that the plaintiff has sufficient a stake in the outcome of the action to insure that a justiable controversy is properly presented to the court. *See* 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 3531.6 at 496 (1984).

In the present case, it is apparent that the decision below in no way implicates the traditional notions of standing upon which Hartford relies in its Petition. Indeed, it has never been suggested that Hartford did not sustain any type of injury as a result of its failure to receive all of the premiums owing by the Debtor. Nor has it ever been suggested that Hartford would not realize some degree of "remedial benefit" if it were permitted to surcharge Union Planter's collateral for these premiums. Instead, as the court below clearly recognized (that is, notwithstanding its convenient use of the term "standing"), the controlling issue in this case is whether Section 506(c) creates a remedy or cause of action in favor of third party claimants such as Hartford. In concluding that it does not, the court below reached a result that is in complete harmony with the prevailing precedents of this Court. *See, e.g., National Railroad Passenger Corporation v. National Association of Railroad Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693 (1974) ("when legislation

expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. . . . This principle of statutory construction reflects an ancient maxim—expressio unius est exclusio alterius.").

III. THE COURT BELOW'S CONSTRUCTION AND APPLICATION OF 11 U.S.C. § 506(c) IN ACCORDANCE WITH ITS PLAIN AND UNAMBIGUOUS TERMS IS IN NO WAY INCONSISTENT WITH THIS COURT'S "HOLISTIC" APPROACH TO STATUTORY CONSTRUCTION

Hartford also insists that the decision below must be reviewed by this Court because it violates established principles of statutory construction. Specifically, Hartford contends that under this Court's "holistic" approach to statutory interpretation, it was impermissible for the court below not to construe the term "trustee" as used in Section 506(c) to include third parties such as itself.

While this Court clearly has recognized that statutory construction "is a holistic endeavor," *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 629 (1988), this does not mean that courts should look to the other provisions in a statute to create ambiguity where none exists. 2A N. Singer, *Sutherland Statutes and Statutory Construction*, § 46.04 at 98 (5th Ed. 1992) ("aids to interpretation can be used only to resolve ambiguity and never to create it."). Indeed, this Court never has suggested that when confronted with a statutory provision that is clear and unambiguous on its face, a court must comb through the other provisions of the statute to determine if there is any conceivable way in which the facially clear and unambiguous provision can be considered ambiguous. Quite the contrary, this Court has repeatedly

emphasized that "[t]he plain meaning of legislation should be conclusive . . . ." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031 (1989). As was stated in *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-4, 112 S.Ct. 1146, 1149 (1992) (citations omitted):

> [C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that the legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, the first canon is also the last: 'judicial inquiry is complete.'

Even putting the foregoing principles aside, it should be apparent that there is no validity to Hartford's contention that other provisions in the Bankruptcy Code require that Section 506(c)'s use of the term "trustee" be construed to include third parties such as itself. Thus, for instance, Hartford attempts to support the latter construction by pointing out that under Bankruptcy Section 503(a), certain kinds of expenses may be recovered from a bankruptcy estate as administrative priority expenses. From this fact, Hartford somehow deduces that "section 506(c) is nothing more than a priority provision." Petitioner's Petition, p. 15. Not only is this reasoning incomprehensible, but Hartford's ultimate conclusion—that Section 506(c) is a "disguised" priority provision—is completely implausible under any established canon of statutory construction.

Indeed, Congress has expressly addressed the subject of "priorities" in Section 507 of the Bankruptcy Code. Specifically, this Section sets forth a very carefully crafted

list of claims that are entitled to priority in a bankruptcy proceeding and defines the relative priority of those claims with respect to one another. *See* 11 U.S.C. § 507. Nowhere in Bankruptcy Code Section 507 is there any reference to Section 506(c) nor any suggestion that the claims of a secured creditor are subordinate to those of an administrative expense claimant such as Hartford. Thus, in essence, what Hartford is proposing is that notwithstanding the elaborate priority framework set forth in Bankruptcy Code Section 507, Congress decided: (1) to create a special priority provision for certain administrative claimants (who are not in any way explicitly referenced in the provision); and (2) to bury that provision in a section of the Bankruptcy Code that is expressly designed to address the nature and extent of secured claims. Clearly, there is no accepted canon of statutory construction pursuant to which it is permissible to assume that Congress engages in such "hocus pocus" when enacting legislation.

Similarly, Hartford points to the provisions of Bankruptcy Code Section 1109(b) to support its assertion that a "holistic" interpretation of the Bankruptcy Code requires that it be allowed to surcharge Union Planters' collateral under Section 506(c). Specifically, Section 1109(b) of the Bankruptcy Code provides that in a Chapter 11 bankruptcy proceeding, "a party in interest . . . may raise and appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b). As courts and other authorities have consistently recognized, Section 1109(b) simply seeks to protect the procedural rights of creditors and other parties in interest to participate in a Chapter 11 proceeding. It is not designed, however, to make available to such parties substantive remedies that they are otherwise not entitled to pursue. *See, e.g., Matter of James Wilson Associates*, 965 F.2d 160, 168-9 (7th Cir. 1992) (all that Section 1109(b) "means is that anyone

who has a legally protected interest that could be affected by a bankruptcy proceeding is entitled to assert that interest with respect to any issue to which it pertains, thus making explicit what is implicit in any *in rem* proceeding —that everyone with a claim to the *res* has the right to be heard before the *res* is disposed of since that disposition will extinguish all such claims.").

Moreover, as the court below correctly noted, Hartford's reliance on the provisions of Bankruptcy Section Code 1109(b) is misplaced on an even more fundamental level, for Section 1109(b) has no application outside the context of Chapter 11 bankruptcy proceeding. *In re Hen House Interstate, Inc.*, 177 F.3d 719, 722, n.3 (8th Cir. 1999) (*en banc*); *see also* 11 U.S.C. § 103(f) ("subchapters I, II and III of Chapter 11 of this title apply only in a case under such chapter."). The instant action, however, was not prosecuted or even initiated until after the Debtor's bankruptcy case had been converted to a Chapter 7 proceeding.

For attempted additional support for its contention that Section 506(c) must be construed to allow third parties such as itself to seek recovery against a secured creditor's collateral, Hartford argues that in contrast to Section 506(c), other provisions of the Bankruptcy Code use the term "only" when identifying certain parties. None of the provisions cited by Hartford, however, involve substantive remedies such as those set forth in Section 506(c). Instead, the provisions cited by Hartford address various procedural and administrative matters with respect to which the inclusion of the term "only" is dictated by the context and purpose of the provisions. *See, e.g.*, 11 U.S.C. § 109(d) (defining those parties who are eligible to be a debtor under certain Chapters of the Bankruptcy Code);

11 U.S.C. § 303(a) (identifying those parties against whom an involuntary bankruptcy petition may be filed); and 11 U.S.C. § 1121(b) (establishing the "exclusive" period during which the debtor is the only party entitled to file a Chapter 11 plan).

Moreover, it is evident throughout the Bankruptcy Code that when Congress wanted to make certain remedies and relief available to creditors and other third party claimants, it expressly did so. *See, e.g.*, 11 U.S.C. § 502(a) (expressly authorizing any party in interest to object to a proof of claim); 11 U.S.C. § 554(b) (expressly authorizing any party in interest to seek the abandonment of property from the bankruptcy estate); 11 U.S.C. § 727 (c)(1) (expressly authorizing any creditor to object to the granting of a discharge to a Chapter 7 debtor); 11 U.S.C. § 727(d) (expressly authorizing any creditor to seek the revocation of a discharge granted to a Chapter 7 debtor); 11 U.S.C. § 1104(a) (expressly authorizing any party in interest to seek the appointment of a Chapter 11 trustee); 11 U.S.C. § 1112(b) (expressly authorizing any party in interest to seek the dismissal or conversion of a Chapter 11 proceeding); U.S.C. § 1121(c) (expressly authorizing any party in interest to file a Chapter 11 plan after the expiration of the debtor's "exclusive period").

Indeed, if Hartford's reasoning were taken to its logical conclusion, each creditor in a bankruptcy proceeding would be entitled to pursue (for its own benefit) such remedies as those set forth in the Bankruptcy Code's "preference" and "fraudulent conveyance" provisions, for while the latter provisions identify the trustee as the party who is to bring such actions, they do not expressly provide that the trustee is the "only" party who may bring such actions. *See* 11 U.S.C. §§ 547, 548; *see also* 11 U.S.C. § 363 (which authorizes the trustee to use, sell or lease property of the bankruptcy estate but does not expressly

state that "only" the trustee may undertake such actions); 11 U.S.C. § 365(a) (which empowers the trustee to assume or reject executory contracts and unexpired leases but does not specify that "only" the trustee may exercise such powers); and 11 U.S.C. § 554(a) (which provides that the trustee may abandon property of the bankruptcy estate but does not expressly state that "only" the trustee may do so). Thus, following the construction advanced by Hartford could produce an absurd result that would defeat the very purpose of a bankruptcy proceeding.

In short, the decision of the court below that Section 506(c) must be construed and applied in accordance with its plain and unambiguous terms can in no way be regarded as incompatitble with a "holistic" construction of the Bankruptcy Code.

IV. THE *MEYER v. FLEMING* DECISION RELIED UPON BY HARTFORD HAS NO RELEVANCE OR APPLICABILITY TO THIS CASE

Finally, Hartford maintains that this Court's holding in *Meyer v. Fleming*, 327 U.S. 161, 66 S.Ct. 382 (1946) mandates that the decision below be reviewed and reversed by the Court. The *Meyer* decision, however, has no factual or legal relevance to the case at hand. Specifically, *Meyer* was a case decided under the former Bankruptcy Act—the predecessor to the modern Bankruptcy Code—in which the Court addressed the narrow issue whether a shareholder of a bankrupt railway company could continue to prosecute, on behalf of the company, an antitrust and shareholder's derivative action that the company's bankruptcy trustee had elected not to pursue. Thus, not only was *Meyer* decided under a different bankruptcy statute, but the case also did not involve any issues regarding the surcharging of a secured creditor's collateral or the right of an administrative claimant (or any other

parties) to pursue remedies established in favor of a bankruptcy trustee. In fact, the case did not even involve a secured creditor or an administrative expense claimant. Thus, it is no surprise that Hartford fails to cite to any decision—nor do there appear to be any decisions—in which a court has relied upon or cited to *Meyer* in support of the conclusion that administrative expense claimant may pursue recoveries under Section 506(c). How Hartford can conclude that the *Meyer* decision provides a basis for this Court to review and reverse the decision below—or that the decision even supports Hartford's construction of Section 506(c) is perplexing to Respondent.

CONCLUSION

For all the foregoing reasons, Respondent Union Planters National Bank respectfully submits that Petitioner Hartford Underwriters Insurance Company's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

HARTFORD UNDERWRITERS INSURANCE COMPANY,
Petitioner,

v.

MAGNA BANK, N.A.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE PETITION

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HARTFORD UNDERWRITERS INSURANCE COMPANY,
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BRIEF OF *AMICUS CURIAE* AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE PETITION

INTEREST OF THE *AMICUS*

Amicus curiae American Insurance Association ("AIA") respectfully submits this brief in support of the petition for writ of certiorari to the Eighth Circuit.[1]

AIA is a national trade association consisting of over 375 property and casualty insurers. AIA's member com-

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amicus curiae* and its member companies, made a monetary contribution to the preparation or submission of this brief. Petitioner Hartford Underwriters Insurance Company is a member of *amicus curiae* American Insurance Association.

panies write workers' compensation insurance throughout the country and account for approximately 42 percent of all such insurance sold by privately-owned insurers. AIA frequently participates as an *amicus curiae* in litigation, such as this case, raising issues of importance to its membership.

The question presented in this case is whether a workers' compensation insurer that provides coverage to an insolvent employer during the period of bankruptcy has standing under section 506(c) of the Bankruptcy Code, 11 U.S.C. § 506(c) (1994), to move the bankruptcy court for payment of premiums out of the collateral of the debtor's secured lender. This issue is one of concern to AIA's members because it substantially affects their rights in the many thousands of instances annually where the employer insured is in bankruptcy.

State laws mandate the purchase of workers' compensation insurance by employers that cannot qualify to self-insure, such as insolvent businesses. Accordingly, employers in chapter 11 proceedings must purchase coverage if they are to reorganize successfully. Insurers will be unwilling to underwrite insurance for an insolvent employer, however, unless there is adequate assurance of payment.

Section 506(c) of the Bankruptcy Code provides such assurance. It allows recovery of unpaid premiums from the collateral of the debtor's secured creditors to the extent such insurance protects the collateral. Section 506(c) is critical for the protection of the insurer. The right to payment out of the debtor's unsecured assets is often an illusory remedy when the debtor does not or cannot pay, because the debtor rarely has any significant unencumbered property. Recourse to the debtor's secured assets is frequently the only meaningful remedy for nonpayment.

The decision of the Eighth Circuit deprives insurers of this essential protection. It prohibits them from obtaining a payment order directly from the bankruptcy court and instead places the insurer at the sufferance of the trustee's discretionary decision whether to pursue the insurer's claim. Unlike the insurance carrier, the trustee has no economic incentive to seek payment aggressively because, by the time of nonpayment, the insurance already has been provided and, under the Bankruptcy Code, cannot be canceled regardless of nonpayment absent relief from the bankruptcy court. *See* 11 U.S.C. § 362(a) (1994).

AIA's member companies thus have a significant interest in the outcome of this litigation because it will substantially affect their ability to receive the premiums promised for their assumption of risk and, indeed, will strongly influence their willingness to afford coverage in the first instance.[2]

SUMMARY OF ARGUMENT

In this case, the Eighth Circuit denied a workers' compensation insurer standing under section 506(c) of the Bankruptcy Code to recover unpaid insurance premiums out of the debtor's secured assets. The lower court reached this conclusion notwithstanding that: (1) the debtor's purchase of such insurance was necessary in order for it to remain in business; (2) the insurer provided the coverage after the bankruptcy filing and thus had a priority for payment; (3) the debtor consented to an order requiring payment, but then did not comply with that order; (4) the debtor had no unencumbered assets out of which the premiums subsequently could be paid; and (5) the debtor's lender consented to use of its collateral to pay neces-

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[2] Both petitioner and respondent have consented to the filing of this brief, and their letter of consent has been filed with the Office of the Clerk of this Court.

sary administrative expenses, including workers' compensation insurance. The Eighth Circuit rationalized this harsh result on the grounds that section 506(c) referred only to the "trustee" and thus did not allow a claim for administrative expenses to be asserted by the post-filing vendors which this provision was created to protect.

As the petition for *certiorari* demonstrates, this case presents an important issue concerning an administrative expense claimant's rights under section 506(c), as to which there is a 4-2 circuit court split. More broadly, this controversy presents issues of general importance concerning proper interpretation of the Bankruptcy Code, in three respects.

First, like section 506(c), numerous other provisions of the Bankruptcy Code explicitly refer only to the "trustee" and do not mention the creditors which these provisions were intended to benefit. As a prime example, the "avoidance" provisions of the Code, governing preferential or fraudulent conveyances of the debtor's property, on their face identify only the "trustee" but are meant to protect creditors by requiring the return of improperly transferred assets. *See* 11 U.S.C. §§ 544(a), 545, 547(b) (1994); 11 U.S.C.S. § 548(a) (Supp. 1999); 11 U.S.C. § 549(a) (1994). Under the rationale of the lower court's decision, creditors would be denied standing to sue for the return of property even though they were the parties directly injured by the unlawful conveyance.

The decision below should thus be reviewed because the Eighth Circuit's rule of statutory construction potentially constricts creditor standing under many provisions in the Code worded comparably to section 506(c). Indeed, precisely because of the parallelism between section 506(c) and these other provisions, another 4-2 circuit court split on creditor standing under the "avoidance"

provisions has arisen, as it has in section 506(c) cases. This Court's intervention is thus necessary to assure a uniform approach by bankruptcy judges and the district courts towards creditor standing under the Code.

Second, the decision below strips creditors of an equitable remedy they have had for more than a century. Section 506(c) was intended to codify pre-Bankruptcy Code law on the rights of claimants to recover post-filing administrative expenses. That pre-Code law had long allowed claimants that provide services to bankrupt companies to assert claims directly against the debtor's secured parties. *See, e.g., Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501 (1891).

This Court consistently has refused to construe the Code " 'to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.' " *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) (citation omitted). Far from intending such a reversal of the pre-1978 law, Congress adopted section 506(c) to preserve it. Accordingly, the decision below should be reviewed because it is in conflict with this Court's decisions requiring deference to pre-Code practice absent a clear expression of contrary congressional intent.

Third, the decision below subverts another important policy of the Code—the chapter 11 policy encouraging reorganization of debtors rather than their liquidation. One way in which this policy is implemented is to provide assurance of payment to suppliers of goods or services necessary to maintain the bankrupt company as an operating business while it attempts to reorganize. The decision below frustrates this important policy without any clear-cut legislative instruction to do so. It sends a message to suppliers of essential goods and services that they deal with the debtor at their peril. The Eighth Circuit's

ruling should thus be reviewed because it creates a significant impediment to debtor reorganization—the primary goal of chapter 11.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION PRESENTED HAS IMPORTANCE NOT ONLY FOR THE SPECIFIC BANKRUPTCY CODE PROVISION AT ISSUE BUT ALSO FOR CREDITOR STANDING UNDER THE CODE GENERALLY

As the petition demonstrates, the Eighth Circuit's decision in *Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 177 F.3d 719 (8th Cir. 1999) (*en banc*) *("Hen House")* raises an important issue—an administrative expense claimant's standing to sue under section 506(c) of the Bankruptcy Code —on which the circuits have split 4-2. In addition, the decision below has major ramifications for the standing of creditors under the Code.

A debtor's creditors have an obvious financial stake in the bankruptcy proceeding and their interest in recovery lies at the center of the zone of interests protected by the Bankruptcy Code. Thus, a creditor's claims satisfy both the Article III "case or controversy" and prudential requirements for standing. *See Hen House*, 177 F.3d at 726-27 (Heaney, J., dissenting). As a result, in order to eliminate creditor standing under a particular Bankruptcy Code provision, there must be some express indication of Congress' intent to make such an exception. *Id.* at 726. In the Code, Congress frequently has done so by inserting language in a specific provision expressly denying standing to designated parties or by using the term "only" to limit the parties with standing. *See* Petition, at 16-17 (citing twenty examples of such provisions in the Code).

Section 506(c) contains no such exclusionary language. It simply provides that "the trustee may recover" certain post-filing administrative costs and expenses from a secured creditor's collateral. It does not additionally state that "only" the trustee may seek recovery or expressly deny a claimant's right to directly petition the bankruptcy court where the recoverable expense was incurred by reason of the claimant's goods or services. The Eighth Circuit nevertheless held that administrative expense claimants such as petitioner Hartford Underwriters Insurance Company ("Hartford") lack standing under section 506(c) because that provision does not explicitly refer to them in addition to the "trustee."

Numerous other provisions of the Code are worded similarly to section 506(c). As a consequence, the rule of construction adopted in the decision below has general significance for creditor standing. For example, the "avoidance" provisions of the Code uniformly provide that "the *trustee* may avoid" various liens and transfers without express reference to any other party in interest. 11 U.S.C. §§ 544(a), 545, 547(b) (1994); 11 U.S.C.S. § 548(a) (Supp. 1999); 11 U.S.C. § 549(a) (1994) (emphasis added).[3]

Under the Eighth Circuit's rationale in *Hen House*, the single reference to "trustee" in the avoidance provisions would be construed to deprive creditors and their committees of standing notwithstanding that they are the ones who were injured by the preferential or improper trans-

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[3] "Avoidance" provisons authorize recovery, on behalf of the bankruptcy estate, of certain improper or unauthorized transfers of money or liens made by a debtor to third parties. For example, § 547 authorizes the recovery of preferential transfers made within 90 days (or in the case of insiders, one year) before the bankruptcy petition. The other provisions cited above address unperfected liens (§ 544), statutory liens such as those for rent (§ 545), fraudulent transfers (§ 548) and unauthorized post-petition payments (§ 549).

fers voidable under these provisions. Indeed, the Eighth Circuit already has taken this view but other circuits have disagreed—giving rise to another 4-2 circuit split over interpretation of the avoidance provisions as over interpretation of section 506(c). *Compare Canadian Pac. Forest Prods. Ltd. v. J.D. Irving, Ltd. (In re Gibson Group, Inc.)*, 66 F.3d 1436, 1438 (6th Cir. 1995) (granting individual creditor standing to bring suit under §§ 547 and 548 to recover preferential or fraudulent conveyances); *Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1362-63 (5th Cir. 1986) (unsecured creditors committee had standing to bring action under § 547); *Unsecured Creditors Committee of Debtor STN Enters., Inc. v. Noyes (In re STN Enters.)*, 779 F.2d 901, 904 (2d Cir. 1985) (committee granted standing to bring preference action); and *Official Unsecured Creditors Comm. of Suffola, Inc. v. U.S. Nat'l Bank of Oregon (In re Suffola, Inc.)*, 2 F.3d 977, 979 n.1 (9th Cir. 1993) (same), *with Saline State Bank v. Mahloch*, 834 F.2d 690, 694-95 (8th Cir. 1987) (individual creditor lacked standing to bring action to avoid lien under § 544); and *In re Xonics Photochemical, Inc.*, 841 F.2d 198, 202 (7th Cir. 1988) (creditor held not to have standing to sue under §§ 544(b) or 548(a)).

The arguments asserted for and against creditor standing under the avoidance provisions echo the debate over section 506(c). Like the dissenters in *Hen House*, the circuits adopting the majority rule favoring creditor standing emphasize the lack of economic incentive for a trustee or debtor in possession to bring the avoidance action, in contrast to the creditor, which has a direct financial stake. *Gibson Group*, 66 F.3d at 1440-41; *Coral Petroleum*, 797 F.2d at 1363; *STN Enters.*, 779 F.2d at 904. On the other hand, like the majority in *Hen House*, the circuits adopting the minority rule contend that allowing individual creditors to sue might disproportionately benefit them to the detriment of other unsecured creditors. *Saline State Banks*, 834 F.2d at 694; *Xonics Photochemical*, 841 F.2d at 202.

The linkage between standing under section 506(c) and the avoidance provisions is further reflected by the reliance on section 506(c) precedent in the avoidance cases. For example, the Sixth Circuit in *Gibson Group* relied heavily on the reasoning of the Third Circuit in *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91 (3d Cir. 1986), the leading circuit decision granting standing to an individual creditor under section 506(c). *Gibson Group*, 66 F.3d at 1443-44. This divergence in section 506(c) and avoidance cases over the standing of parties other than the trustee has spilled over to yet other similarly-worded provisions of the Bankruptcy Code and Bankruptcy Rules.[4]

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[4] *Compare In re Brileya*, 108 B.R. 444, 447 (Bankr. D. Vt. 1989) (limited reference in § 1206 to sale of property by "trustee" includes chapter 12 debtor-in-possession), *with In re Webb*, 932 F.2d 155, 158 (2d Cir. 1991) (authorizing sale by chapter 12 debtor but only because trustee approved sale which was deemed "the functional equivalent of his selling the property"); *compare Tindall v. Mavrode (In re Mavrode)*, 205 B.R. 716, 719 (Bankr. D.N.J. 1997) (court authorized settlement under Bankruptcy Rule 9019 even though motion for approval was not brought by trustee, the only party mentioned in that rule), *with In re Nationwide Sports Distribs.*, 227 B.R. 455, 462 n.3 (Bankr. E.D. Pa. 1998) (language of Rule 9019(a) limits its application to the trustee); *compare Freeman v. Eli Lilly Federal Credit Union (In re Freeman)*, 72 B.R. 850 (Bankr. E.D. Va. 1987) (chapter 13 debtor granted authority to avoid lien under § 544 (a) even though that provision not expressly listed in § 1303 regarding powers of chapter 13 debtor) and *Carr v. Demusis (In re Carr)*, 34 B.R. 653, 655 (Bankr. D. Conn. 1983) (same), *aff'd*, 40 B.R. 1007 (D. Conn. 1984), *with Walls v. Appalachian Tire Prods., Inc. (In re Walls)*, 17 B.R. 701, 703 (Bankr. S.D. W.Va. 1982) (chapter 13 debtor lacked standing to bring

In sum, a pervasive split has developed between the lower courts regarding creditor standing under the Bankruptcy Code. One school of thought precludes standing by creditors, unless expressly identified in the relevant substantive provision of the Code, notwithstanding that the creditors have significant financial interests at stake which that provision was designed to protect. Another school of thought recognizes that Congress sought to protect creditors with direct financial interests and therefore grants standing absent an express denial. Supreme Court review is thus needed to establish a uniform rule for the national bankruptcy system.

II. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RULE THAT REMEDIES EXISTING PRIOR TO ENACTMENT OF THE BANKRUPTCY CODE SHOULD BE PRESERVED, ABSENT CONTRARY CONGRESSIONAL INTENT

The Eighth Circuit's decision effectively means that a vendor furnishing goods or services, after the bankruptcy filing, that preserve the collateral of a secured creditor is denied any effective remedy for nonpayment. This ruling should be reviewed because it conflicts with (1) the pre-Code case law that Congress intended to codify and (2) this Court's rule of deference to pre-Code practice.

Although interpretation of the Bankruptcy Code (like other statutes) must begin with its language, *see United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989), the meaning of section 506(c) on the question of standing is far from "plain." As noted above (*see* p. 6 *infra*), there are at least *twenty* Bankruptcy Code provisions where Congress expressly limited standing, either by using the word "only" to limit the parties with standing

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preference action under § 547) and *In re Carter*, 2 B.R. 321, 322 (Bankr. D. Colo. 1980) (same under § 544).

or by explicitly denying certain parties a direct right of action. In contrast, section 506(c) contains no such restrictive language. The fact that Congress chose not to employ such language in section 506(c) creates, at a minimum, ambiguity that justifies reference to the Code's legislative history and to pre-Code practice. *See Dewsnup v. Timm*, 502 U.S. 410, 417 (1992); *Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411, 1417 (1999) (referring to pre-Code practice where language of Code is "inexact").

There was a federal bankruptcy practice in existence decades before passage of the Code and, indeed, even before enactment of the comprehensive Bankruptcy Act of 1898 which remained in effect until promulgation of the Code in 1978. 1 COLLIER ON BANKRUPTCY ¶ 1.01, at 1-3 to 1-6 (15th ed. 1999). As a result, when Congress amends the bankruptcy laws, "it does not write 'on a clean slate.'" *Dewsnup v. Timm*, 502 U.S. at 419 (quoting *Emil v. Hanley*, 318 U.S. 515, 521 (1943)). In *Dewsnup*, the Court announced a rule of statutory construction where, as here, a Code provision was ambiguous. The courts should not interpret the Code to deny a right or remedy that existed under pre-Code practice (or grant a new right or remedy), without some concrete indication in the legislative history that Congress intended to alter the prior practice. 502 U.S. at 419-20. More recently, this Court reaffirmed that it "'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'" *Cohen v. De La Cruz*, 523 U.S. at 221 (quoting *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 563 (1990)).

The legislative history of 506(c) shows that it "codifies current law." H.R. Rep. No. 95-595, at 357 (1977)

reprinted in 1978 U.S.C.C.A.N. 5787, 6313. That "current law" allowed claimants who provided services during bankruptcy or receivership to bring claims directly against secured collateral.

This pre-Code rule was established long ago. One of the earliest cases was *Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501 (1891), where this Court authorized an attorney to recover $300 from the sale proceeds of collateral for legal services that enabled the recovery and rental of train engines to the benefit of the security holders. The Court held that the attorney had a direct right of recovery against the property where the receiver lacked the capacity or will to pursue the claim:

> [W]hen he [the receiver] has not acted, and the question is presented to the court as to the liability of the property for any claim, the court is not foreclosed by the order of appointment [of the receiver], but may consider and determine equitably the extent of liability of the property to such claim, and what its rights of priority may be. Hence, as the receiver did not pay this claim, the parties in interest may rightfully challenge its priority, even if it were within the very letter of the order of appointment of the receiver.

Id. at 506. The rationale for this rule was the very same as for present day section 506(c): "We think it may fairly be held that the [secured] party who takes the benefit of such a service [by an administrative expense claimant] ought to pay for it and that equity may properly decree payment therefor." *Id.* at 507.

A similar ruling was made in *In re Rotary Tire & Rubber Co.*, 2 F.2d 364 (6th Cir. 1924). Brokers who provided insurance during the bankruptcy sought direct recovery of premiums against the sale proceeds of the insured property, even though the property was subject to

a $35,000 mortgage. The lower court held, and the Sixth Circuit affirmed, that the brokers were entitled to priority for premiums in an amount equal to the mortgage, because the insurance preserved the value of the mortgaged property. *Id.* at 364.

Other pre-Code decisions also allowed claimants other than the trustee to bring claims directly against secured property. *See, e.g., National Acceptance Co. v. District No. 1, Progressive Mine Workers of Am. (In re Chapman Coal Co.)*, 196 F.2d 779, 781 (7th Cir. 1952) (union brought successful petition to obtain first lien on previously-secured assets of corporation for wages incurred to preserve the assets); *First W. Savs. & Loan Ass'n v. Anderson*, 252 F.2d 544, 550 (9th Cir. 1958) (court held that attorney as well as trustee entitled to first lien on secured property for fees for services rendered); *United States v. Henderson*, 274 F.2d 419, 422 (5th Cir. 1960) (both trustee and attorneys were parties to action for recovery of fees from mortgagee's collateral); *Citizens & Southern Nat'l Bank v. Mullins (In re Bolton Rd. Med. Ctr.)*, 433 F. Supp. 369, 371 (N.D. Ga. 1976) (both trustee and his attorneys were parties to proceeding for recovery of expenses against secured property); *In re Alaska Plywood Corp.*, 166 F. Supp. 423, 425 (D. Alaska 1958) (both trustee and stockholders committee requested and received priority against mortgaged assets superior to that of secured creditors).

The pre-Code practice codified in section 506(c) thus demonstrates that Congress intended to preserve, not to withhold, the right of administrative expense claimants such as Hartford to move the bankruptcy court for payment out of the collateral of secured creditors. The petition should therefore be granted in order to review a decision that frustrates this Congressional objective and

does so by ignoring this Court's rule favoring continuity in interpretation of the nation's bankruptcy laws.

III. THE DECISION BELOW PRESENTS AN ISSUE OF GENERAL IMPORTANCE BECAUSE IT UNDERMINES CONGRESSIONAL POLICY FAVORING REHABILITATION OF DEBTORS

As this Court has recognized, the policy underlying chapter 11 of the Bankruptcy Code is to promote rehabilitation of debtors by giving them time to reorganize as going concerns, where possible, rather than being immediately liquidated. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984); *Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. at 1421.

Section 503 was enacted to implement this policy. That provision recognizes that, in order to maintain the debtor as a viable business while it attempts to reorganize, there must be some assurance of payment to suppliers of necessary goods and services without which the debtor could not continue operating. Section 503 encourages suppliers to provide such goods and services by giving them a priority in payment over other unsecured creditors out of the debtor's remaining unencumbered assets. *See* 11 U.S.C. § 503 (1994).

The reality, however, is that the debtor often has no such unsecured assets. In *Hen House*, for example, Magna Bank had a lien on the debtor's cash reserves. 177 F.3d at 721. Section 506(c) has thus evolved under bankruptcy law into an important complement to Section 503. Where unencumbered assets are insufficient to pay administrative expenses, section 506(c) allows payment out of the collateral securing a lender's credit, either by consent or upon a showing that the expense provided a direct benefit to the secured creditor or its collateral. This provides vendors with greater assurance that they will be paid for services rendered to an insolvent business.

Section 506(c) is not adverse to the secured creditor's interests. Often, the value of the creditor's collateral is higher if the business can be preserved or sold as a going concern. In such a case, the secured creditor benefits from section 506(c) expenses because the lender can recover more if the debtor successfully reorganizes than if the debtor's assets are liquidated at fire sale prices. Section 506(c) thus carefully balances the chapter 11 policy favoring reorganization with the rights of secured creditors.

The decision by the Eighth Circuit upsets this careful balance. Vendors will not sell the debtor necessary goods and services, and professionals will not perform services for the bankruptcy estate, unless there is reasonable assurance of receiving payment. They will not have that assurance if they are prevented from directly obtaining an order from the bankruptcy court requiring payment out of secured collateral. The administrative expense claimant's only remedy would then be to rely on the trustee to assert its claim before the bankruptcy court. The trustee, however, lacks the same incentive to pursue payment because the trustee's mission is to preserve the debtor's estate and because he or she usually has higher priorities. This case presents a concrete example of why the trustee may not zealously protect the claimant's interests.

Workers' compensation insurance is the quintessential type of good or service necessary to preserve the going concern value of a business in chapter 11. Insurance not only provides economic protection to the employer but is legally required. Every state except Texas requires employers, in order to finance workers' compensation benefits

paid to injured employees, to purchase insurance or to self-insure.[5]

In many jurisdictions, the State Labor Department can shut down a company that fails to secure workers' compensation insurance coverage. In some states, an uninsured employer can be sued in tort by injured employees, who can recover substantially more than the statutorily-prescribed workers' compensation benefits. These tort claims, if they occur after the bankruptcy filing, are treated as an administrative expense that could seriously diminish the debtor's assets. *See Reading Co. v. Brown*, 391 U.S. 471, 485 (1968).

An employer that becomes insolvent and enters chapter 11 does not have the statutorily-required financial resources to qualify for self-insurance. Insurance must therefore be purchased from a licensed carrier. Insurers, however, will be unwilling to provide coverage if they do not have an effective means for obtaining payment of premiums. Outside of bankruptcy, the insurer may cancel a policy during the policy period for nonpayment. But this option is not available in bankruptcy, because the Code generally forbids termination of contracts with the debtor absent relief from the automatic stay. *See* 11 U.S.C. § 362 (1994). Thus, once an insurer agrees to underwrite insurance for a bankrupt employer, it may be "locked in" and required to pay benefits to insured employees even if the employer defaults in payment of premiums. The trustee, in turn, has little incentive to deplete the assets of the estate to pay premiums because coverage is assured irrespective of

[5] *See, e.g.*, Ariz. Rev. Stat. § 23-961; Cal. Lab. Code § 3700; Conn. Gen. Stat. § 31-284; Fla. Stat. Ann. § 440.38; 820 Ill. Comp. Stat. § 305/4; Ky. Rev. Stat. Ann. § 342.340; Md. Code Ann., Lab. & Empl. § 9-402; Mass. Gen. Laws (Ann.) ch. 152, § 25A; Minn. Stat. § 176.181; Mo. Rev. Stat. § 287, 280; N.Y. Work. Comp. Law § 50; Va. Code Ann. § 65.2-801.

payment. As a result, absent direct recourse to the bankruptcy court, insurers may decline to underwrite coverage out of concern they will never be paid.

Conversely, the ruling below cannot be justified as necessary to support the Code's policy of protecting creditor collateral. If the administrative claimant is permitted to present its claim directly to the bankruptcy court, it can recover only if it demonstrates that the expense was reasonably necessary for the preservation of the debtor's collateral *and* was of direct benefit to the secured lender. *See* 11 U.S.C. § 506(c) (1994).

Nor can the decision below be justified as needed to prevent preferential treatment of one unsecured claimant at the expense of others, as circuits adopting the minority rule have held. *See Hen House*, 177 F.3d at 723; *Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 484 (4th Cir. 1994). As the dissent in *Hen House* correctly points out, the whole purpose of § 506(c) is to create a priority for certain administrative expense claimants over other creditors. 177 F.3d at 727.

The decision below should thus be reviewed because it is inconsistent with the general policy of chapter 11 favoring reorganization and the specific tool for implementing that policy Congress fashioned in section 506(c).

CONCLUSION

For the reasons stated herein, this Court should grant the petition for review of the Eighth Circuit's decision.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 23 1999
CLERK

No. 99-409

IN THE

Supreme Court of the United States

HARTFORD UNDERWRITERS INSURANCE COMPANY,

Petitioner,

v.

UNION PLANTERS BANK, N.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED NOVEMBER 8, 1999

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RELEVANT DOCKET ENTRIES

U.S. District Court
Eastern District of Missouri (Eastern)

CIVIL DOCKET FOR CASE #: 96-CV-1991

Magna Bank of IL, et al v. Hartford Underwriter
Filed: 10/04/96
Assigned to: Honorable Charles A. Shaw
Demand: $0,000
Nature of Suit: 422
Lead Docket: None
Jurisdiction: Federal Question
Dkt # in USBC: is 91-45623-293

Cause: 28:0158 Notice of Appeal re Bankruptcy Matter (BAP)

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10/4/96 1 BANKRUPTCY RECORD ON APPEAL; Appellant's brief ddl 10/21/96 (aeh) [Entry date 10/04/96]

10/4/96 2 TRACK INFORMATION STATEMENT filed by USBC; track 4 preferred (aeh) [Entry date 10/04/96]

10/4/96 — REMARK original transcripts received from USBC on hearing dates 4/5/94 and 1/13/94 (aeh) [Entry date 10/04/96]

10/4/96 3 CASE MANAGEMENT ORDER; administrative(4) track appeallant shall serve and file a brief within fifteen (15) days of the docketing of the appeal, appellee shall serve and file a brief within fifteen (15) days and appellant may serve and file a reply brief within then (10) days (cc: all counsel) (aeh) [Entry date 10/04/96]

10/15/96 4 MOTION by appellant Magna Bank of IL to extend to 11/18/96 to fle brief pursuant to Rule 8009 of the Fed Rules of Bankruptcy Procedure (set) [Entry date 10/22/96]

10/18/96 5 ORDER by Honorable Charles A. Shaw granting motion to extend to 11/18/96 to fle brief pursuant to Rule 8009 of the Fed Rules of Bankruptcy Procedure [4-1] (cc: all counsel) (set) [Entry date 10/22/96]

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10/18/96 6 ORDER by Honorable Charles A. Shaw; Resp to court ddl 11/18/96 . . . The parties shall file written responses on or before 11/18/96, stating whether each party will or will not consent to this appeal being heard by the Panel. In the event a party does not file a response, the Court will assume that party consents to the Panel. SO ORDERED (CAS) (cc: all counsel) (set) [Entry date 10/22/96]

11/4/96 7 RESPONSE (Consent to have appeal heard by the Bankruptcy appeal panel) to court by appellant Magna Bank of IL [6-2] (cql) [Entry date 11/06/96]

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12/18/96 10 MOTION by appellant Magna Bank of IL for leave to file brief in excess of 15 pages (set) [Entry date 12/27/96] [Edit date 12/27/96]

12/24/96 10 APPELLANT's Brief by appellant Magna Bank of IL re [1-1] w/attached appendix brief w/15 exhibits in separate expansion folder (set) [Entry date 12/27/96]

12/31/96 11 MOTION by appellee Hartford Underwriter to extend to 2/3/97 to file its brief (set) [Entry date 01/03/97]

12/31/96 11 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to extend to 2/3/97 to file its brief [11-1] (cc: all counsel) GRANTED (CAS) (set) [Entry date 01/03/97]

12/31/96 12 MOTION by appellee Hartford Underwriter for leave to amend record on appeal (set) [Entry date 01/03/97]

12/31/96 13 RULED DOCUMENT by Honorable Charles A. Shaw granting motion for leave to amend record on appeal [12-1] (cc: all counsel) GRANTED (CAS) (set) [Entry date 01/03/97]

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1/30/97 14 MOTION by appellee Hartford Underwriter to extend time thru 2/10/97 to file its brief pursuant to Rule 8009 of Federal Bankruptcy Rules. (cql) [Entry date 02/03/97]

1/30/97 15 ORDER by Honorable Charles A. Shaw granting motion to extend time thru 2/10/97 to file its brief pursuant to Rule 8009 of Federal Bankruptcy Rules. [14-1] (cc: all counsel) (cql) [Entry date 02/03/97]

2/10/97 18 MOTION by appellee Hartford Underwriter for hearing (Oral Argument) pursuant to bankruptcy rule 8012. (cql) [Entry date 02/24/97]

2/18/97 16 MOTION by appellee Hartford Underwriter for leave to file brief in excess of 15 pages (set) [Entry date 02/20/97]

2/18/97 16 RULED DOCUMENT by Honorable Charles A. Shaw granting motion for leave to file brief in excess of 15 pages [16-1] (cc: all counsel) GRANTED (CAS)A (set) [Entry date 02/20/97]

2/18/97 17 APPELLEE's brief by appellee Hartford Underwriter re [1-1] LEAVE TO FILE (CAS) appendix to brief and designation of supplemental record in separate expansion folder (set) [Entry date 02/20/97]

Relevant Docket Entries

2/20/97 19 MOTION by appellant Magna Bank of IL to extend time up to and including March 14, 1997 to file its reply brief pursuant to Rule 8009 of the Federal Rules of Bankruptcy Procedure (mrc) [Entry date 02/25/97]

2/20/97 20 ORDER by Honorable Charles A. Shaw granting appellant's motion to extend time up to and including March 14, 1997 to file its reply brief pursuant to Rule 8009 of the Federal Rules of Bankruptcy Procedure [19-1] (cc: all counsel) (mrc) [Entry date 02/25/97]

3/18/97 21 MOTION by appellant Magna Bank of IL for leave to file reply brief in excess of page limitation (cql) [Entry date 03/20/97]

3/18/97 21 RULED DOCUMENT by Honorable Charles A. Shaw granting motion for leave to file reply brief in excess of page limitation [21-1] (cc: all counsel) (cql) [Entry date 03/20/97]

3/18/97 22 REPLY brief by appellant Magna Bank of IL re [1-1] (cql) [Entry date 03/20/97]

9/10/97 23 JUDGMENT: by Honorable Charles A. Shaw for appellee Hartford Underwriter IT IS HEREBY ORDERED, ADJUDGED AND DECREED that he decision of the Bankruptcy Court is AFFIRMED terminating case w/attached memo (cc: all counsel) (set) [Entry date 09/16/97] [Edit date 09/16/97]

Relevant Docket Entries

10/9/97 24 RECEIPT # S98-000273 in the amount of $ 105.00 for notice of appeal (mrc) [Entry date 10/14/97]

10/9/97 25 NOTICE OF APPEAL filed by appellant Magna Bank of IL re: the District Court decision; [23-2] fee: $ 105.00 paid (mrc) [Entry date 10/14/97]

10/14/97 — REMARK — Notice of Appeal, Vol. #III of court file, and docket entries forwarded to Special Projects Unit this date (mrc) [Entry date 10/14/97]

10/15/97 — DELIVERED TO USCA — 1 Civil Appeal Cover Sheet, 2 Certified Copies of Notice of Appeal filed by respondent, Magna Bank of Illinois, 2 Certified Copies of Clerk's Docket entries and 2 copies of JUDGMENT/MEMO (CAS) filed on 09/10/97. Copy of NOA to Judge Shaw. cc: NOA, Clerk's Docket entries and USCA letter to parties. (pam) [Entry date 10/15/97]

10/20/97 26 DESIGNATION OF RECORD ON APPEAL by appellant Magna Bank of IL (kec) [Entry date 10/23/97]

10/31/97 27 NOTIFICATION AND BRIEFING SCHEDULE (USCA) FILED USCA #: 97-3859: method of appendix preparation notification 11/10/97, designation of record and statement of issues-appellant 11/10/97, designation of record-appellee 11/20/97, joint appendix (3 copies) 12/10/97, brief-appellant w/addendum 12/10/97, brief appellee 1/9/98, reply brief (optional) 1/23/98. (set) [Entry date 11/04/97]

7/27/98 28 Opinion from USCA on USCA number 97-3859 Opinion of USCA: affirm (cql) [Entry date 07/29/98]

8/19/98 29 ORDER FROM USCA copy filed USCA number: 97-3859EMSL requesting that counsel submit 21 copies of their response, limited to 10 pages by 8/31/98 (jwj) [Entry date 08/20/98]

9/22/98 30 ORDER FROM USCA copy filed USCA number: 97-2859 granting appellant suggestion for rehearing (jwj) [Entry date 09/23/98]

6/8/99 31 LETTER from USCA: USCA # 97-3859 EMSL re: to the petition for rehearing deadline. (jwj) [Entry date 06/10/99]

6/8/99 32 Opinion from USCA on USCA number 97-3859EMSL Opinion of USCA: reverse/ remand (jwj) [Entry date 06/21/99]

6/10/99 33 NOTICE By the Court of Appeals of the corrected opinion (the correction relates to the addition of a footnote on page one of the opinion) (jwj) [Entry date 06/21/99]

7/20/99 34 MANDATE W/OPINION ATTACHED from (USCA) reversing and remanding the Decision of the District Court [Appeal [25-1]] USCA number: 97-3859 (cc: all counsel) (cql) [Entry date 07/22/99]

7/28/99 35 JUDGMENT: by Honorable Charles A. Shaw — IT IS HEREBY ORDERED that the Judgment issued herein on September 10, 1997 is vacated. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to the mandate of the Eighth Circuit Court of Appeals, the decision of the United States Bankruptcy Court for the Eastern District of Missouri in "In Re Hen House Interstate, Inc. NO. 91-45623-293" is reversed. IT IS FURTHER ORDERED that this matter is remanded to US Bankruptcy with instructions to vacate its judgment of August 14, 1996 and dismiss Hartford Underwriters' claim for lack of standing. (for appellant Magna Bank of IL against appellee Hartford Underwriter in the amount of $ none terminating case (cc: all counsel) (mrc) [Entry date 07/29/99]

Relevant Docket Entries

9/15/99 36 LETTER from USCA regarding Writ of Certiorari, petition placed on 9/8/99 docket #99-409 (cql) [Entry date 09/17/99]

[END OF DOCKET: 4:96cv1991]

EMERGENCY MOTION FOR RELIEF FROM AUTOMATIC STAY OR, IN THE ALTERNATIVE, FOR ADEQUATE PROTECTION, AND FOR ORDER DENYING USE OF CASH COLLATERAL, AND REQUIRING SEGREGATION AND ACCOUNTING OF CASH COLLATERAL DATED SEPTEMBER 6, 1991

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Proceedings Under Chapter 11

Case No. 91-45623-293

In Re:

HEN HOUSE INTERSTATE, INC.,

Debtor.

LANDMARK BANK OF ILLINOIS,

Movant,

v.

HEN HOUSE INTERSTATE, INC.,

Respondent.

EMERGENCY MOTION FOR RELIEF FROM AUTOMATIC STAY OR, IN THE ALTERNATIVE, FOR ADEQUATE PROTECTION, AND FOR ORDER DENYING USE OF CASH COLLATERAL AND REQUIRING SEGREGATION AND ACCOUNTING OF CASH COLLATERAL

Hearing date: September 6, 1991
Hearing time: 2:00 p.m.

Carl J. Spector, Esq.
Karen W. Fries, Esq.
Bryan, Cave, McPheeters & McRoberts
500 North Broadway
St. Louis, Missouri 63102
(314) 231-8600

Motion _____

Comes now Movant, Landmark Bank of Illinois (formerly known as Landmark Bank of Fairview Heights), by and through its undersigned attorneys, and for its *Emergency Motion For Relief From Automatic Stay, Or In The Alternative, For Adequate Protection, And For Order Denying Use Of Cash Collateral And Requiring Segregation and Accounting Of Cash Collateral* states pursuant to Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure and 11 U.S.C. §§ 362 and 363, as follows:

Jurisdiction

1. This Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334, as this proceeding arises in the above-styled Chapter 11 proceeding.

Parties

2. Landmark Bank of Illinois (formerly known as Landmark Bank of Fairview Heights) ("Landmark") is an Illinois banking corporation with its principal place of business in Fairview Heights, Illinois.

3. Hen House Interstate, Inc. (the "Debtor") is a Delaware corporation and is the debtor-in-possession in the Chapter 11 case in which this proceeding is filed.

FIRST CLAIM
(For Relief From Automatic Stay)

4. Landmark is the holder of a certain revolving line of credit note, executed and delivered by the Debtor as of June 2, 1987 in consideration of a loan by Landmark to the Debtor, wherein the Debtor promised to pay to Landmark the principal sum of $350,000.00 with interest thereon, as more fully set forth therein (the "Revolving Note"). A true and correct copy of the Revolving Note is filed contemporaneously herewith under separate cover as Exhibit 1 and incorporated herein by reference.

5. Landmark is the holder of a certain term promissory note, executed and delivered by the Debtor as of June 2,

1987 in consideration of a loan by Landmark to the Debtor, wherein the Debtor promised to pay to Landmark the principal sum of $4,460,000.00 with interest thereon, as more fully set forth therein (the "Term Note"). A true and correct copy of the Term Note is filed contemporaneously herewith under separate cover as Exhibit 2 and incorporated herein by reference.

6. Landmark is the holder of a certain promissory note, executed and delivered by the Debtor as of March 31, 1991 in consideration of a loan by Landmark to the Debtor, wherein the Debtor promised to pay to Landmark the principal sum of $53,000.00 with interest thereon as more fully set forth therein (the "Promissory Note"). A true and correct copy of the Promissory Note is filed contemporaneously herewith under separate cover as Exhibit 3 and incorporated herein by reference.

7. The Revolving Note and Term Note were amended pursuant to a First Amendment to Promissory Notes ("First Amendment to Notes") dated December 28, 1990. A true and correct copy of the First Amendment to Notes is filed contemporaneously herewith under separate cover as Exhibit 4 and incorporated herein by reference. The Revolving Note, Term Note, First Amendment to Notes and Promissory Note are hereinafter collectively referred to as the "Notes".

8. In connection with the execution of the Notes, the Debtor and Landmark entered into a loan agreement executed May 15, 1987 (the "Original Loan Agreement"). A true and correct copy of the original Loan Agreement is filed contemporaneously herewith under separate cover as Exhibit 5 and incorporated herein by reference.

9. The Loan Agreement was amended pursuant to a First Amendment to Loan Agreement ("Loan Agreement Amendment #1") dated December 28, 1990. A true and correct copy of the Loan Agreement Amendment #1 is filed contemporaneously herewith under separate cover as Exhibit 6 and incorporated herein by reference.

10. The Loan Agreement was again amended pursuant to a Second Amendment to Loan Agreement ("Loan Agreement Amendment #2") dated March 31, 1991. A true and correct copy of the Loan Agreement Amendment #2 is filed contemporaneously herewith under separate cover as Exhibit 7 and incorporated herein by reference. The original Loan Agreement, Loan Agreement Amendment #1 and Loan Agreement Amendment #2 are hereinafter collectively referred to as the "Loan Agreement."

11. The Debtor executed and delivered to Landmark the following documents in order to secure the repayment of all obligations of Debtor to Landmark:

a. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 1524, Page 727 in the records of the Recorder's Office of the County of Champaign, State of Illinois (the "Champaign County Mortgage"), which encumbers certain premises in the County of Champaign, State of Illinois, described more fully therein (the "Champaign County Premises"). A true and correct copy of the Champaign County Mortgage is filed contemporaneously herewith under separate cover as Exhibit 8 and incorporated herein by reference.

b. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 148, Page 320 in the records of the Recorder's Office of the County of DeWitt, State of Illinois (the "DeWitt County Mortgage"), which encumbers certain premises in the County of DeWitt, State of Illinois, described more fully therein (the "DeWitt County Premises"). A true and correct copy of the DeWitt County Mortgage is filed contemporaneously herewith under separate cover as Exhibit 9 and incorporated herein by reference.

c. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number 180011 in the records of the Recorder's Office of the County of Ford, State of Illinois (the "Ford County Mortgage"), which encumbers certain premises in the County of Ford, State of Illinois, described more fully therein (the "Ford County Premises"). A true and correct copy of the Ford County Mortgage is filed contemporaneously herewith under separate cover as Exhibit 10 and incorporated herein by reference.

d. Deed of Trust given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number I775025 at I1683P2261 et. seq. in the records of the Recorder's Office of the County of Jackson, State of Missouri (the "Jackson County Deed"), which encumbers certain premises in the County of Jackson, State of Missouri, described more fully therein (the "Jackson County Premises"). A true and correct copy of the Jackson County Deed is filed contemporaneously herewith under separate cover as Exhibit 11 and incorporated herein by reference.

e. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 173, Page 518 in the records of the Recorder's Office of the County of Laurel, State of Kentucky (the "Laurel County Mortgage"), which encumbers certain premises in the County of Laurel, State of Kentucky, described more fully therein (the "Laurel County Premises"). A true and correct copy of the Laurel County Mortgage is filed contemporaneously herewith under separate cover as Exhibit 12 and incorporated herein by reference.

f. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 3423, Page 1266 in the records of the Recorder's Office of the County of Madison, State of Illinois (the "Madison County Mortgage"), which encumbers certain premises in the County of Madison, State of Illinois, described more fully therein (the "Madison County Premises"). A true and correct copy of the Madison County Mortgage is filed contemporaneously herewith under separate cover as Exhibit 13 and incorporated herein by reference.

g. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 399, Page 485 in the records of the Recorder's Office of the County of Marion, State of Illinois (the "Marion County Mortgage"), which encumbers certain premises in the County of Marion, State of Illinois, described more fully therein (the "Marion County Premises"). A true and correct copy of the Marion County Mortgage is filed contemporaneously herewith under separate cover as Exhibit 14 and incorporated herein by reference.

h. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number 87-10253 in the records of the Recorder's Office of the County of McLean, State of Illinois (the "McLean County Mortgage"), which encumbers certain premises in the County of McLean, State of Illinois, described more fully therein (the "McLean County Premises"). A true and correct copy of the McLean County Mortgage is filed contemporaneously herewith under separate cover as Exhibit 15 and incorporated herein by reference.

i. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 374, Page 247 in the records of the Recorder's Office of the County of Morgan, State of Indiana (the "Morgan County Mortgage"), which encumbers certain premises in the County of Morgan, State of Indiana, described more fully therein (the "Morgan County Premises"). A true and correct copy of the Morgan County Mortgage is filed contemporaneously herewith under separate cover as Exhibit 16 and incorporated herein by reference.

j. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 1987, Page 7516 in the records of the Recorder's Office of the County of Delaware, State of Indiana (the "Delaware County Mortgage"), which encumbers certain premises in the County of Delaware, State of Indiana, described more fully therein (the "Delaware County Premises"). A true and correct copy of the Delaware County Mortgage is filed contemporaneously herewith under separate cover as Exhibit 17 and incorporated herein by reference.

k. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 2676, Page 1130 in the records of the Recorder's Office of the County of St. Clair, State of Illinois (the "St. Clair County Mortgage"), which encumbers certain premises in the County of St. Clair, State of Illinois, described more fully therein (the "St. Clair County Premises"). A true and correct copy of the St. Clair County Mortgage is filed contemporaneously herewith under separate cover as Exhibit 18 and incorporated herein by reference.

l. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number 167252 in Book 367, Page 345 in the records of the Recorder's Office of the County of Washington, State of Illinois (the "Washington County Mortgage"), which encumbers certain premises in the County of Washington, State of Illinois, described more fully therein (the "Washington County Premises"). A true and correct copy of the Washington County Mortgage is filed contemporaneously herewith under separate cover as Exhibit 19 and incorporated herein by reference.

m. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number R87-28965 in the records of the Recorder's Office of the County of Will, State of Illinois (the "Will County Mortgage"), which encumbers certain premises in the County of Will, State of Illinois, described more fully therein (the "Will County Premises"). A true and correct copy of the Will County Mortgage is filed contemporaneously herewith under separate cover as Exhibit 20 and incorporated herein by reference.

n. Collateral Pledge Agreement by the Debtor to Landmark dated May 15, 1987 (the "Collateral Pledge") wherein Debtor pledged to Landmark a certificate of deposit and other items as more fully described therein. A true and correct copy of the Collateral Pledge is filed contemporaneously herewith under separate cover as Exhibit 21 and incorporated herein by reference.

o. Security Agreement-Equipment by the Debtor to Landmark dated May 15, 1987 (the "Equipment Security Agreement") wherein the Debtor granted to Landmark a security interest in furniture, fixtures, equipment, and machinery of every kind and nature, as more fully set forth in the Equipment Security Agreement. A true and correct copy of the Equipment Security Agreement is filed contemporaneously herewith under separate cover as Exhibit 22 and incorporated herein by reference.

p. Security Agreement (Inventory-Accounts Receivable) by the Debtor to Landmark dated May 15, 1987 (the "Inventory Security Agreement") wherein the Debtor granted to Landmark a security interest in the Debtor's inventory and accounts receivable as more fully set forth in the Inventory Security Agreement. A true and correct copy of the Inventory Security Agreement is filed contemporaneously herewith under separate cover as Exhibit 23 and incorporated herein by reference.

q. Assignment of Interest in Contracts and Leases by the Debtor to Landmark dated May 15, 1987 (the "Contracts/Leases Assignment") wherein the Debtor assigned to Landmark all of the Debtor's right, title and

interest in and to all contracts, permits, licenses, easements and leases, as more fully described therein. A true and correct copy of the Contracts/Leases Assignment is filed contemporaneously herewith under separate cover as Exhibit 24 and incorporated herein by reference.

r. Assignment of Contract Rights by the Debtor to Landmark dated May 15, 1987 (the "Contract Rights Assignment") wherein the Debtor granted to Landmark a security interest in all of the Debtor's rights under a Management Services Agreement between the Debtor and Omni Outdoor Advertising, Inc. as more fully described therein. A true and correct copy of the Contract Rights Assignment is filed contemporaneously herewith under separate cover as Exhibit 25 and incorporated herein by reference.

12. The Champaign County Mortgage, DeWitt County Mortgage, Ford County Mortgage, Jackson County Deed, Laurel County Mortgage, Madison County Mortgage, Marion County Mortgage, McLean County Mortgage, Morgan County Mortgage, Delaware County Mortgage, St. Clair County Mortgage, Washington County Mortgage, Will County Mortgage, Collateral Pledge, Equipment Security Agreement, Inventory Security Agreement, Contracts/Lease Assignment and Contract Rights Assignment are hereinafter collectively referred to as the "Collateral Documents." The Notes, the Loan Agreement and the Collateral Documents are hereinafter sometimes collectively referred to as the "Loan Documents."

13. Perfection of Landmark's security interests granted in the Collateral Documents, was effectuated *inter alia* by the filing of Uniform Commercial Code Financing Statements with the offices and in the indexes as noted thereon (the "Filings"). True and correct copies of the Filings are filed contemporaneously herewith under separate cover as Exhibit 26 and incorporated herein by reference.

14. As of the petition date the Debtor was indebted to Landmark in the aggregate amount of $4,139,676.57 plus accruing interest, costs, expenses and fees of collection (the "Indebtedness").[1]

15. The obligations incurred in connection with the Notes are in default and all amounts owed thereunder are due and payable.

16. All of the real and personal property on which Landmark holds security interests is hereinafter collectively referred to as the "Collateral."

17. Landmark's interests in the Collateral are not adequately protected. The Debtor has not provided Landmark with the cash funds necessary (i) to preserve the value of Landmark's position in the Collateral and (ii) to maintain the Collateral in good condition against physical depreciation and other items.

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1. Interest has been calculated at the pre-default rate. Landmark reserves the right to claim interest at the Default Rates specified in the Loan Documents.

18. Landmark hereby reserves any and all of its rights under 11 U.S.C. § 362(d)(2).

19. Sufficient factual and legal cause exists for the relief requested herein.

20. Landmark reserves any and all rights which it may have to dispose of the Collateral and to assert claims against the Debtor for any deficiency owed to Landmark after disposition of the collateral.

WHEREFORE, Landmark prays that this Court enter an order:

(a) Granting Landmark relief from the 11 U.S.C. § 362(a) automatic stay, thereby allowing Landmark to exercise its full rights under the Loan Documents;

(b) Directing the Debtor to surrender immediate possession of the Collateral to Landmark;

(c) Stating that no part of the costs of this proceeding be charged against Landmark or against the Collateral;

(d) Authorizing Landmark to apply the proceeds from any sale of the Collateral, less attorneys' fees and expenses incurred to the date of such sale, to its claim and ordering that Landmark's claim be allowed against the Debtor in the amount of any deficiencies; and

(e) Granting Landmark such other and further relief as may be necessary to protect its interests in the Collateral.

SECOND CLAIM
(Alternative Request for Adequate Protection)

21. Landmark hereby restates and realleges each and every allegation contained in Paragraphs 1 through 20 of this Motion and incorporates the same herein by reference.

22. Pursuant to 11 U.S.C. § 362, this Court may refuse to grant Landmark the relief sought in its First Claim only if Landmark is provided adequate protection that will result in the realization by Landmark of the indubitable equivalent of Landmark's interests in the Collateral on the filing date of Debtor's Chapter 11 petition herein.

23. The Debtor continues to operate its business using the Collateral which secures the Debtor's obligations to Landmark.

24. Such use of the Collateral by the Debtor is causing a substantial decline in the value of Landmark's interests in the Collateral.

25. Realization of the indubitable equivalent of Landmark's interests in the Collateral requires that this Court order that the Debtor preserve and adequately protect the Collateral and Landmark's petition-date position therein.

WHEREFORE, in the alternative, Landmark prays that this court enter an order providing Landmark with adequate protection sufficient to insure the indubitable equivalent of Landmark's interests in the Collateral, which adequate protection shall include, but not be limited to, an order of this Court requiring that:

(a) the Debtor shall pay to Landmark such amounts and take such other steps as will adequately protect Landmark against the decline in value of the Collateral during the pendency of the 11 U.S.C. § 362 automatic stay;

(b) the Debtor shall cause all taxes and penalties accruing on the Collateral to be paid monthly and without becoming delinquent;

(c) the Debtor shall obtain and keep in force adequate insurance on the Collateral, with Landmark named as the loss payee thereof, evidence of which shall be provided to Landmark;

(d) the Debtor shall properly repair, service, and maintain the Collateral in good condition, reasonably satisfactory to Landmark and in accordance with applicable law;

(e) the Debtor shall cooperate and provide assistance to enable Landmark to inspect the Collateral and the Debtor's books and records at any time and from time to time as Landmark shall reasonably elect to insure compliance with this Court's order; and

(f) if the Debtor fails to comply with respect to any order of this court relating to the Collateral, Landmark immediately shall have all the rights and remedies otherwise granted to it by the Loan Documents including, without limitation, immediate possession of the Collateral, relief from the 11 U.S.C. § 362(a) automatic stay, and such other relief as will provide Landmark the indubitable equivalent of its interests in the Collateral.

THIRD CLAIM
(For Order Denying Use and Requiring Segregation of Cash Collateral)

26. Landmark hereby restates and realleges each and every allegation of Paragraphs 1 through 25 of this Motion and incorporates the same herein by reference.

27. All cash or cash equivalents representing proceeds of the Collateral that are now in the Debtor's possession, custody, or control or which will come into its possession, custody or control during the pendency of this proceeding constitute cash collateral, as that term is defined in § 363(a) of the United States Bankruptcy Code (the "Cash Collateral").

28. Section 363(c)(2) of the United States Bankruptcy Code prohibits the Debtor from using the Cash Collateral unless Landmark consents to the use of the Cash Collateral or the Court authorizes its use, after notice and a hearing, and a specific finding that Landmark's interests in the Cash Collateral are adequately protected.

29. Landmark objects and does not consent to Debtor's use of the Cash Collateral.

30. Landmark's interests in the Cash Collateral cannot be adequately protected in this proceeding because:

(i) The Collateral consists of deteriorating assets and the Cash Collateral generated therefrom, if used and expended, would result in a decline in the value of Landmark's interests in the Collateral;

(ii) the Debtor does not have available unencumbered assets or property from which it can fund periodic cash payments or grant additional liens in order to protect Landmark from a decline in the value of the Collateral; and

(iii) the Debtor has operated, and is expected to continue to operate, at a loss. As a result, the Debtor will not generate or have available sufficient post-petition property with which to protect Landmark from the decline in the value of its interests in the Collateral by way of periodic cash payments or granting additional liens.

31. Because the Debtor is and will be unable to adequately protect Landmark's interest in the Cash Collateral, the Debtor can only use the Cash Collateral if Landmark consents to such use. Landmark objects and does not consent to the Debtor's use of Cash Collateral.

32. The Court should, pursuant to § 363(c)(4) of the United States Bankruptcy Code, immediately order and direct the Debtor to segregate, account for, and maintain the Cash Collateral in a separate account at Landmark.

WHEREFORE, Landmark prays that this Court enter an order:

(a) Denying the Debtor's right to use the Cash Collateral;

(b) Prohibiting the Debtor from using or dissipating the Cash Collateral;

(c) Directing the Debtor to immediately segregate and account to Landmark for the Cash Collateral and deposit all Cash Collateral in a separate account at Landmark;

(d) Directing the Debtor to forthwith prepare and deliver to Landmark an accounting of all present and future Cash Collateral;

(e) Conditioning continuation of the automatic stay as to Landmark, and the Collateral, upon the Debtor's compliance with each of the above prayers; and

(f) Granting such other and further relief as the Court deems just and proper.

LANDMARK BANK OF ILLINOIS

By s/ Carl J. Spector
Carl J. Spector, Esq. #30509
Karen W. Fries, Esq. #39782
Bryan, Cave, McPheeters & McRoberts
Suite 2000
500 North Broadway
St. Louis, Missouri 63102
(314) 231-8600

Its Attorneys

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CASE NUMBER 91-45623-293

IN PROCEEDINGS UNDER CHAPTER 11

IN RE:

HEN HOUSE INTERSTATE, INC.,

Debtor.

ORDER GRANTING LANDMARK BANK OF ILLINOIS RELIEF FROM THE AUTOMATIC STAY

This matter having come before the Court on the *Emergency Motion for Relief from the Automatic Stay or, in the Alternative, for Adequate Protection, and for Order Denying Use of Cash Collateral and Requiring Segregation and Accounting of Cash Collateral* (the "Motion") filed by Landmark Bank of Illinois ("Landmark"); the Court having heard the arguments of Landmark's counsel in support thereof and the statements of all other parties appearing in Court in connection therewith; due and appropriate notice of the Motion and the hearing thereon having been given; it appearing that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and Local District Court Rule 29 and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); the Court being fully advised in the

premises and having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and for good cause shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

The automatic stay of 11 U.S.C. § 362 shall be and hereby is terminated with respect to Landmark and its interest in the Collateral, as defined in the Motion.

DATED: September __, 1991.

UNITED STATES BANKRUPTCY JUDGE

Emergency Motion for Relief from Automatic Stay

U.S. Bankruptcy Court, Eastern District of Missouri,
1114 Market Street, St. Louis, Missouri 63101

NOTICE OF MOTION COVER SHEET

Name of Debtor
HEN HOUSE INTERSTATE, INC.

Case Number/Judge
91-45623-293

* * *

Plaintiffs/Movant
LANDMARK BANK OF ILLINOIS

Attorneys (Firm Name, Address & Telephone No.)
Carl J. Spector, Esq.
BRYAN, CAVE, McPHEETERS
& McROBERTS
500 N. Broadway, Suite 2000
St. Louis, MO 63102

Defendants/Respondent
HEN HOUSE INTERSTATE, INC.

Attorneys (if known)
David A. Warfield, Esq.
HUSCH, EPPENBERGER, DONOHUE,
Cornfeld & Jenkins
100 North Broadway
St. Louis, MO 63102

Emergency Motion for Relief from Automatic Stay

Print Name of Attorney (or Plaintiff/Movant)
CARL J. SPECTOR

Signature of Attorney

s/ Carl J. Spector

Date
09/06/91

Return Date
Sept. 6, 1991

Time
2:00 p.m.

NATURE OF MOTION
(Check All Boxes that Apply to This Motion)

☒ To Grant Relief from the Automatic Stay — 11 U.S.C. Section 362(d) (terminate, annul, modify, or condition the Automatic Stay)

(*$60.00 fee required*)

* * *

☐ Other — (Specify Type of Motion)
Motion for Relief from Automatic Stay or, in the Alternative, for Adequate Protection, and for Order Denying Use of Cash Collateral and Requiring Segregation of Cash Collateral.

FILING FEE (Check One Box) ☒ Fee Attached

* * *

EMERGENCY MOTION FOR ORDER AUTHORIZING DEBTOR TO OBTAIN POST-PETITION FINANCING PURSUANT TO 11 U.S.C. § 364, TO UTILIZE CASH COLLATERAL PURSUANT TO 11 U.S.C. § 363, AND GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED PARTY DATED SEPTEMBER 7, 1991

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Proceedings Under Chapter 11

Case No. 91-45623-293

In re:

HEN HOUSE INTERSTATE, INC.,

Debtor.

HEN HOUSE INTERSTATE, INC.,

Movant.

EMERGENCY MOTION FOR ORDER AUTHORIZING DEBTOR TO OBTAIN POST-PETITION FINANCING PURSUANT TO 11 U.S.C. § 364, TO UTILIZE CASH COLLATERAL PURSUANT TO 11 U.S.C. § 363, AND GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED PARTY

Emergency Motion to Obtain Post-Petition Financing

Hearing Date: September 6, 1991
Hearing Time: 2:00 p.m.

David A. Warfield, Esq.
Husch & Eppenberger
100 North Broadway, St. 1300
St. Louis, MO 63102
(314) 421-4800

Motion: E

Comes now Hen House Interstate, Inc., ("Debtor"), by and through its undersigned counsel, and for its *Emergency Motion for Order Authorizing Debtor to Obtain Post-Petition Financing Pursuant to 11 U.S.C. § 364, to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363, and Granting Adequate Protection to Pre-Petition Secured Party* states as follows:

I. JURISDICTION

1. On September 5, 1991 ("Petition Date"), Debtor filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code (the "Code"). Since the Petition Date, Debtor has continued in possession of its properties and has operated its various businesses as a debtor in possession.

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and Rule 29 of the Local Rules for the United States District Court for the Eastern District of Missouri. This is a core proceeding pursuant to 28 U.S.C. § 157.

II. DESCRIPTION OF THE DEBTOR'S BUSINESS

3. Debtor currently owns or operates 18 restaurants in several midwestern states. Hen House Restaurants are typically located on major interstate highways and serve low to moderately-priced meals. In addition, several of the Hen House Restaurants also sell gasoline and other petroleum products. Some of the restaurants have gift shops where various items of inexpensive merchandise is sold.

4. Debtor also owns and operates an outdoor advertising firm located in Muncie, Indiana, which does business as Omni Outdoor Advertising. Typically, Debtor leases small tracts of real estate where it places its billboard apparatus. Debtor then enters into various short-term contracts to display advertisements for various its customers.

III. DEBT AND CAPITAL STRUCTURE

5. Debtor's total indebtedness, both secured and unsecured, as of the Petition Date, is approximately $5,000,000, as described in more detail below.

6. Landmark Bank of Illinois ("Landmark") is Debtor's primary secured creditor. Pursuant to various and sundry pre-petition loan documents, instruments, and agreements, Debtor owes Landmark approximately $3,925,000 (the "Pre-Petition Indebtedness"). To secure the Pre-Petition Indebtedness, Landmark has a valid, perfected, first priority lien and security interest in substantially all of Debtor's assets, including, without limitation, all of Debtor's real estate, inventory, accounts receivable, furniture, fixtures,

machinery, equipment, and the proceeds and products therefrom (the "Pre-Petition Collateral").

7. Debtor currently has approximately 600 vendors with whom it has open accounts. The approximate total amount of these claims is $1,000,000. Debtor also has numerous lessors, both for its restaurants and in its billboard businesses, from whom Debtor leases both real and personal property.

8. Debtor currently has 450 issued and outstanding shares of common stock. The common stock is closely held among approximately twelve shareholders, most of whom are members of the family of Hen House's founder, William Dooner.

IV. PROPOSED POST-PETITION FACILITY

9. As debtor in possession, Debtor needs to borrow funds from Landmark in order to meet its on-going cash and credit requirements during its Chapter 11 case, and requires immediate and continued use of Landmark's cash collateral (the "Cash Collateral"). Consequently, Debtor requests this Court approve a Post-Petition Loan Agreement between Debtor, as borrower, and Landmark as the DIP lender. The Post-Petition Loan Agreement permits Debtor to borrow on a secured basis up to an aggregate amount of $300,000. A copy of the proposed form of the Post-Petition Loan Agreement is attached hereto has *Exhibit A*.

10. In addition, Debtor asks that it be granted access to the borrowing called for in the Post-Petition Loan Agreement (the "Post-Petition Facility") on an expedited and interim

basis pursuant to an Emergency Order ("Emergency Order"), so that it can obtain up to $50,000 in cash from the Post-Petition Facility for the 20-day period before this Court concludes a final hearing on this Motion. The Emergency Order is attached hereto as an *Exhibit* to the Post-Petition Loan Agreement. It is essential to avoid immediate and irreparable harm to Debtor's businesses, cash flows, inventory, and customer base that Debtor obtain the requested cash to meet these needs. Any disruptions would severely impact Debtor's cash flow and cash availability adversely, and irreparably hinder Debtor's reorganization effort. At the final hearing, Debtor will seek entry of a Final Order ("Final Order") approving the entire $300,000 Post-Petition Facility and use of Cash Collateral on the terms and conditions specified in the Emergency Order.

11. Reference should be made to the Post-Petition Loan Agreement itself for a full recitation of the terms and conditions of the proposed Post-Petition Facility. The following are more detailed descriptions of the primary provisions of the Post-Petition Loan Agreement[1]:

---

1. All capitalized terms, unless otherwise defined herein, shall have the same meaning as in the Post-Petition Loan Agreement.

Amount of Facility:	$300,000 revolving line of credit
Term:	3 months
Interest Rate:	Prime + 5%
Commitment Fee:	None
Unusual Facility Fee:	None
Security:	First priority liens and administrative claims on all assets of the Debtor

12. If the Post-Petition Loan Agreement and the Debtor's right to use Cash Collateral are not approved, the consequences would include a rapid deterioration of viable businesses that can and should be reorganized. There are more than 500 employees of the Debtor whose jobs will be at risk if there is no reorganization. Furthermore, various suppliers depend on the Debtor's businesses for a substantial portion of their income. The seasonality of the Debtor's businesses prevent the Debtor from operating its businesses solely on cash collateral. Without the availability of the Post-Petition Facility, the Debtor's suppliers would have no assurance of repayment, and most likely would refuse to provide the Debtor with customary trade terms. In fact, the Debtor is aware that its primary food vendor, Prairie Farms Dairy, Inc., has agreed to extend two-week trade credit terms in large part because of the presence of the Post-Petition Facility.

13. The amount requested pursuant to the Post-Petition Facility is reasonable. Not only must Debtor make its ordinary course expenditures in a timely fashion, but it also must compensate for the short-term disruption in cash flows that the Chapter 11 filing will precipitate, and for the adverse reaction by some suppliers in placing the Debtor on cash-on-delivery terms. In short, the proposed financing is critical to assure that the Debtor can stay in business.

14. Sections 363 and 364 of the Bankruptcy Code set forth certain standards for approving secured financing arrangements and cash collateral usage. The Post-Petition Loan Agreement implements these same standards: (i) credit on an unsecured, administrative, or priority basis must be unavailable; (ii) existing lienholders whose interests are adversely affected must be adequately protected; and (iii) relief may be granted only after a duly noticed hearing. Further, under Federal Rules of Bankruptcy Procedure 4001(c)(2), this Court may permit borrowings under the Post-Petition Loan Agreement prior to the final hearing to the extent necessary to avoid immediate and irreparable harm to the Debtor's business.

15. A debtor is permitted to obtain credit or incur debt secured by superpriority lien, as contemplated by the Post-Petition Loan Agreement, only if it is unable to obtain such credit elsewhere. 11 U.S.C. § 364(d)(1). To satisfy statutory obligations under this Section, a debtor need not seek credit from every possible lender before concluding that such credit is unavailable. *Bray v. Shenandoah Federal Savings and Loan Association* (In re Snowshoe Co., Inc.), 789 F.2d 1085 (4th Cir. 1986).

16. Debtor contacted a number of prospective lenders to determine whether it could obtain a DIP financing package of comparable magnitude on better terms. Debtor was unable to find any lender willing to extend credit to Debtor post-petition on similar terms.

17. The Post-Petition Loan Agreement represents an arm's-length transaction among the Debtor and Landmark. In negotiating the terms of the Post-Petition Facility, the Debtor has exercised its sound business judgment and has upheld its fiduciary duty to its bankruptcy estate.

18. In order to preserve the existing value of the Debtor's businesses, it is critical that the Debtor create a constructive environment at the outset of these proceedings. By continuing its relationship with Landmark, the Debtor believes the groundwork will be laid to stabilize the Debtor's businesses and thereby facilitate a positive economic framework within which the Debtor ultimately will be able to reorganize.

V. DEBTOR REQUIRES IMMEDIATE AND CONTINUED USE OF LANDMARK'S CASH COLLATERAL

19. The Debtor's cash needs are critical. The Debtor requires the use of all Cash Collateral, as well as approval of the Post-Petition Facility, in order to facilitate continued operations.

20. Pursuant to Section 363(c)(2) of the Code, the court may permit Debtor's use of Cash Collateral so long as the

interest of any third party in the Cash Collateral is adequately protected. Pursuant to Bankruptcy Rule 4001(c)(2), the Court may permit the Debtor's use of cash collateral prior to a final hearing as is necessary to avoid immediate and irreparable harm.

21. The Debtor's use of Cash Collateral will facilitate continued operations and directly affect the anticipated use of the Post-Petition Facility. Without the use of Cash Collateral, it is anticipated that the Post-Petition Facility may not provide adequate funds to satisfy the Debtor's cash needs, and conversely, the use of Cash Collateral by the Debtor will reduce the amount of funds actually drawn on the Post-Petition Facility.

22. As adequate protection under 364(c) and 361 of the Code, and as security for and inducement to Landmark to permit the Debtor to use cash collateral, the Debtor has agreed to provide to Landmark a first priority lien and security interest on all assets of the Debtor.

A. THE DEBTOR REQUIRES ENTRY OF AN EMERGENCY ORDER TO AVOID IMMEDIATE AND IRREPARABLE HARM

23. The Debtor's request to use cash collateral and to access $50,000 of the Post-Petition Facility on an emergency basis is only so much as is necessary in order to avoid immediate and irreparable harm over the first 20 days of these proceedings. Trade creditors have tightened the Debtor's credit terms and the Debtor reasonably anticipates that many creditors (aside from Prairie Farms Dairy, Inc.)

will insist on cash on delivery terms upon the commencement of these proceedings.

24. If the interim relief requested is not granted, the Debtor will be threatened with a virtual shut down of its business. The Debtor will suffer immediate and irreparable harm to its cash flows, sales, goodwill and reputation. The Debtor's prospects for consummating any plan of reorganization will diminish greatly.

B. DEBTOR HAS MET THE LEGAL STANDARDS FOR ENTRY OF AN EMERGENCY ORDER

25. The immediate and irreparable harm standard, applied to a business that hopes to reorganize, may be satisfied by the threatened loss of business. *In re Ames Department Store*, 115 B.R. 34, 36 (Bankr. S.D.N.Y. 1990). (citing *Lemmes Motors, Inc. v. Ford Motor Corp.*, 429 F.2d 1197 (2nd Cir. 1970)). Similarly, in *In re Sullivan Ford Sales* 2 B.R. 350, 356 (Bankr. D. M. 1980) the court stated that *ex parte* relief for interim financing will be granted when the Debtor shows that denial of such relief would result in "immediate and irreparable injury, loss, or damage to the debtor or to the reorganization effort." The Debtor requests that this Court approve the form and manner of notice with respect to the final hearing on the closed Post-Petition Facility in the form attached hereto as *Exhibit B*. A Committee of Unsecured Trade Creditors has yet to be appointed in this case. The Debtor proposes to serve and give immediate notice of the final hearing on this motion to: (a) the United States Trustee and (b) each of the creditors on the list filed by the Debtor pursuant to Bankruptcy Rule 1007(d).

26. Because denial of the emergency relief sought herein would cause immediate and irreparable injury, loss, and damage to the Debtor and its reorganization efforts, the notice of this emergency hearing, through either attempted hand delivery, or facsimile transmission is not only in compliance with Federal Rule of Bankruptcy Procedure 4001(c)(1) and (3), but it is substantially more than adequate and sufficient in these urgent circumstances given the immediate and irreparable harm that will result from failure to obtain interim financing. The Debtor respectfully requests that this Court schedule a hearing on the date of the filing of this Motion to approve the Debtor's request for interim financing and use of Cash Collateral.

IV. PRAYER FOR RELIEF

WHEREFORE, Debtor respectfully requests that this Court:

a. enter an Emergency Order in the form attached hereto as an *Exhibit* to the Post-Petition Loan Agreement authorizing the requested interim financing of $50,000 pursuant to the Post-Petition Facility and authorizing the Debtor to use Cash Collateral;

b. after the final hearing, enter a Final Order approving in all respects the terms of the Emergency Order and authorizing the Debtor to obtain credit pursuant to the Post-Petition Loan Agreement and authorizing the Debtor's use of Cash Collateral;

c. find that Landmark is adequately protected as is necessary under Sections 361, 363 and 364 of the Bankruptcy Code;

d. approve the substance, form and content of the Notice of Final Hearing in the form attached hereto as *Exhibit B*; and

e. authorize such other and further relief as the Court deems just and equitable.

HUSCH & EPPENBERGER

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St. Louis, MO 63102
(314) 421-4800

Attorneys for Hen House Interstate, Inc., Debtor and Debtor in Possession

EXHIBIT A

POST-PETITION LOAN AGREEMENT

BETWEEN

LANDMARK BANK OF ILLINOIS

AND

HEN HOUSE INTERSTATE, INC.
CHAPTER 11 DEBTOR AND
DEBTOR-IN-POSSESSION

September __, 1991

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THIS POST-PETITION LOAN AGREEMENT (the "Agreement") made on this __ day of September, 1991, by and between Hen House Interstate, Inc., debtor and debtor-in-possession (the "Borrower"), a Delaware corporation and Landmark Bank of Illinois (formerly Landmark Bank of Fairview Heights) (the "Lender"), an Illinois banking corporation.

WHEREAS, Borrower is currently indebted to Lender pursuant to the terms of a Loan Agreement dated May 15, 1987 (the "1987 Loan Agreement"), which provided for the extension of a term loan ("1987 Term Loan") and revolving credit loan ("1987 Revolver Loan"), all pursuant to the terms of the 1987 Loan Agreement, and

WHEREAS, the 1987 Term Loan and 1987 Revolver Loan (collectively the "1987 Loan") are secured, *inter alia*, by first lien mortgages on the parcels of real estate owned by Borrower and identified in *Exhibit A* attached, and

WHEREAS, THE 1987 Loan Agreement was amended by a First Amendment to Loan Agreement dated December 28, 1990, which amendment provided, *inter alia*, for an increase in the amount of the 1987 Loan, and by a Second Amendment to Loan Agreement dated in March, 1991, which provided, *inter alia*, for the extension of the maturity of indebtedness in the amount of $53,000 from Borrower to Lender (the 1987 Loan Agreement, as amended by said Amendments, being continued to be referred to as the "1987 Loan Agreement" and the indebtedness evidenced by said Amendments shall be deemed part of the 1987 Loan), and

WHEREAS, Borrower has filed a voluntary petition in reorganization pursuant to Chapter 11 of the United States Bankruptcy Reform Act of 1978, as amended ("Code"), and the bankruptcy proceedings are presently pending in the U.S. Bankruptcy Court for the Eastern District of Missouri ("Court"), St. Louis, Missouri, Cause No. 91-45623-293 ("Reorganization Proceedings"), and

WHEREAS, Lender is willing to advance said funds from time to time, in its sole and absolute discretion upon each request for advance, only in accordance with the terms and conditions as set forth in this Agreement;

NOW, THEREFORE, the parties hereto agree as follows:

SECTION 1.

LOAN

1.1 *The Revolving Line of Credit Loan.* Lender agrees to provide Borrower with a revolving line of credit in the maximum amount of Three Hundred Thousand Dollars ($300,000), the proceeds of which are to be used to provide Borrower with working capital needs and to fund a $100,000 retainer for Borrower's Court-appointed attorneys (the "Revolving Line of Credit Loan" or "Loan").

(1) Interest Rate/Term of Revolving Line of Credit Loan: The interest rate on the Revolving Line of Credit Loan will be five percent (5%) per annum over the Prime Rate as adjusted simultaneously with any change in such Prime Rate. The term of the Revolving Line of Credit Loan will be to

and including the Termination Date, and interest will be payable weekly.

(2) *Execution and Delivery of Promissory Note*: To evidence its obligation to repay the Revolving Line of Credit Loan, Borrower shall execute a· d deliver to Lender a Promissory Note (the "Revolving Note" or "Note"), with such terms and conditions as are set forth in *Exhibit B* attached hereto and incorporated herein by reference.

The Revolving Note is sometimes hereinafter referred to as the "Note."

(3) *Collateral for Revolving Line of Credit Loan*: To secure the Revolving Line of Credit Loan, Lender shall receive through an Order of the Bankruptcy Court a first, priority and perfected senior lien and security interest in all presently owned and hereafter acquired real and personal property, assets and rights of any kind and nature of Borrower, including all proceeds thereof, wherever located, and Borrower will deliver or cause to be delivered to Lender, *inter alia*, the following collateral (hereinafter collectively referred to as the "Revolving Line of Credit Loan Collateral" or "Collateral"):

(a) A first priority deed of trust or mortgage on certain real property and improvements constituting Hen House Restaurants located at the addresses described in *Exhibit C* attached hereto (hereinafter referred to as the "Restaurants"). The lien of the said deeds of trust and mortgage shall secure, *pari passu*, the 1987 Loan.

(b) A first priority security interest in all equipment, fixtures, machinery, inventory, general intangibles, leases, licenses, accounts receivable, and other personal property now owned or hereafter acquired by Borrower.

(c) The Unlimited Guaranty of William Dooner (the "Guarantor") in the form of *Exhibit D* attached hereto and made a part hereof by reference.

(d) A collateral pledge in recordable form of all leases and licenses held by Borrower, as lessee or licensee, concerning real estate locations for outdoor advertising signs owned by Borrower.

(e) A collateral assignment of all Borrower's right, title and interest in that certain management agreement, between Borrower and Omni Outdoor Management Company, Inc., Atlanta, Georgia, a Georgia corporation.

The documents described in subparagraph (3) above are hereinafter collectively referred to as the "Revolving Line of Credit Loan Collateral Documents."

The lien of the Revolving Line of Credit Loan Collateral shall be a first lien *pari passu* with the lien of the collateral for the 1987 Loan.

1.2 *The Closing*.

The Loan will be closed on such date (the "Closing Date") as Lender shall determine following Lender's receipt of all documents, certificates, collateral and such other items

as required by this Agreement, but in any event no later than September 20, 1991, otherwise this Agreement shall terminate.

1.3 *Expenses.*

Whether or not the Loan contemplated by this Agreement shall be consummated, the Borrower will pay all reasonable expenses of the Lender incident to the transactions contemplated by this Agreement or in connection with any modification, amendment, alteration, or enforcement of this Agreement or the Note, including, but not limited to, the Lender's out-of-pocket expenses and the fee charges and disbursements of its counsel. The obligations of the Borrower under this paragraph shall survive the payment in full of the Note.

SECTION 2.

REPRESENTATIONS AND WARRANTIES

2.1 *Subsidiaries.*

The Borrower represents to Lender that it has no Subsidiaries and warrants and covenants to Lender that it will not acquire, create or otherwise have any Subsidiaries during the term of the Loan (or any extensions or renewals thereof) without the express written consent of the Lender.

Exhibit E to this Agreement correctly sets forth (1) the state in which the Borrower is incorporated, (2) the state or states in which the Borrower conducts its businesses, and

(3) a list of the stock of each class of the Borrower, showing in each case the number of shares of stock of each class outstanding and the shares of each class owned as of the Closing Date by the Borrower. The shares of stock listed in *Exhibit E* as owned by the Borrower have been duly issued and are fully paid and nonassessable, and are so owned as of the date of this Agreement free and clear of any mortgage, lien, pledge, charge, security interest or other encumbrance.

2.2 *Corporate Organization and Authority.*

The Borrower is duly and validly organized and existing corporation in good standing under the laws of its jurisdictions of incorporation and is duly licensed or qualified and in good standing as a foreign corporation in all other jurisdictions where the ownership or leasing of property or the nature of business transacted makes such qualification necessary, and is entitled to own its properties and assets, and to carry on its business, as, and in the places where, such properties and assets are now owned or operated or such business is now conducted or presently proposed to be conducted. The Borrower has made payment of all franchise and similar taxes in its jurisdiction of incorporation, and in all jurisdictions in which it is qualified as a foreign corporation, insofar as such taxes are due and payable at the date of this Agreement, except for any such taxes the validity of which is being contested in good faith and for which proper reserves have been set aside on the books of the Borrower.

2.3 *Business, Property and Indebtedness.*

Exhibit F to this Agreement correctly sets forth a brief description of the business (as conducted and presently

proposed to be conducted) and properties (including leaseholds and capitalized lease obligations) of the Borrower and correctly lists all of the outstanding Indebtedness for borrowed money of the Borrower.

2.4 *Financial Statements.*

The consolidated balance sheets of the Borrower and its Subsidiaries for each of the last three fiscal years of the Borrower ending September 30, the consolidated profit and loss and surplus statements of the Borrower and its Subsidiaries for each of such fiscal years, all certified by Price Waterhouse, independent certified public accountants, and the consolidated balance sheets of the Borrower and its Subsidiaries as of September 30, 1991, and the consolidated profit and loss and surplus statements of the Borrower and its Subsidiaries for the six month period then ended, certified by a principal financial officer of the Borrower, copies of all of which balance sheets and statements have heretofore been delivered to Lender, were prepared in accordance with generally accepted accounting principles consistently applied throughout the periods involved, are correct and complete (subject, in the came of such interim statements, to normal year-end audit adjustments) and fairly present the consolidated financial position and results of operations of the Borrower and its Subsidiaries for each such fiscal year (and for such interim period).

2.5 *Full Disclosure.*

The financial statements referred to in Section 2.4 hereof do not, nor does this Agreement, or any written statement

furnished by the Borrower to the Lender in connection with the negotiation or making of the Loans, contain any untrue statement of a material fact or omit a material fact necessary to make the statements contained therein or herein not misleading. There is no fact which the Borrower has not disclosed to the Lender in writing which materially and adversely affects nor, so far as the Borrower can now foresee, is reasonably likely to prove to affect materially and adversely the business, operations, properties, prospects, profits or condition (financial or otherwise) of the Borrower or the ability of the Borrower to perform this Agreement.

2.6 *Pending Litigation.*

There are no actions, suits, investigations or proceedings pending or, to the knowledge and belief of the Borrower, threatened against or affecting the Borrower or the business, operations, properties, prospects, profits, or condition (financial or otherwise) of the Borrower before or by any governmental department, commission, board, regulatory authority, bureau, agency, or instrumentality, domestic, foreign, federal, state or municipal (herein collectively "governmental agency"), or any court, arbitrator or grand jury, which is reasonably likely to result in any material adverse change in the business, operations, properties, prospects, profits or condition (financial or otherwise) of the Borrower or in the ability of the Borrower to perform this Agreement, the Note or the Collateral Documents, except for the Reorganization Proceedings.

2.7 *Title to Properties; No Title Retention Agreements.*

The Borrower has good and marketable fee title to all of the Collateral and good and marketable title to all other property and assets reflected in the latest audited balance sheet referred in Section 2.4 or purported to have been acquired by the Borrower subsequent to such date, except property and assets sold or otherwise disposed of subsequent to such date in the ordinary course of business. Except for the interests of those creditors described in *Exhibit G* attached hereto and made a part hereof by reference all property and assets of any kind (real or personal, tangible or intangible) of the Borrower are free from any encumbrance, and are free from any other liens, encumbrances or defects in title which are substantial in amount, or which affect or impair the operations of the business of the Borrower. No financing statement under the Uniform Commercial Code which names the Borrower has been filed and the Borrower has not signed any financing statement or any security agreement authorizing any secured party thereunder to file any such financing statement.

None of the assets or property, the value of which is reflected in the latest audited consolidated balance sheet referred to in Section 2.4, is held by the Borrower as lessee under any lease (excluding capitalized lease obligations) or its conditional vendee under any conditional sales contract or other title retention agreement. The Borrower enjoys peaceful and undisturbed possession under all of the leases and licenses under which it is operating, none of which contains any unusual or burdensome provisions that will materially impair or adversely affect the operations of the

Borrower. All of such leases and licenses are valid, subsisting and in full force and effect and none of such leases is in default (in any material respect) and no event has occurred which with the passage of time or the giving of notice, or both, would constitute a default under any thereof.

2.8 *Patents and Trademarks.*

The Borrower possesses all patents, patent rights or licenses, trademarks, trademark rights, trade names, trade name rights, and copyrights which are required to conduct its business as now conducted without known conflict with the rights of others.

2.9 *Transaction is Legal and Authorized.*

The borrowing of the principal amount of the Loan and compliance by the Borrower with all of the provisions of this Agreement, the Collateral Documents and the Note are within the corporate powers of the Borrower.

This Agreement, the Note and the Collateral Documents have been duly authorized, executed and delivered and upon the entry of the Court Order (hereinafter defined) are the legal, valid and binding obligations of the Borrower, enforceable in accordance with their respective terms.

2.10 *No Defaults or Restrictions.*

Neither the execution and delivery of this Agreement, the Collateral Documents, the consummation of the transactions contemplated hereby or thereby, nor compliance

with their respective terms and conditions and with the terms and provisions of the Note, will conflict with or result in a breach of, or constitute a default under, any of the terms, obligations, covenants, conditions or provisions of any corporate restriction or of any indenture, mortgage, deed of trust, pledge, bank loan or credit agreement, corporate charter, bylaws or any other agreement or instrument to which the Borrower is now a party or by which it or its properties may be bound or affected, or, upon entry of the Court Order (hereinafter defined) any judgment, order, writ, injunction, decree or demand of any court, arbitrator, grand jury or any governmental agency or result in the creation or imposition of any lien, charge or encumbrance of any nature whatsoever upon any property or asset of the Borrower or any Subsidiary under the terms or provisions of any of the foregoing.

2.11 *Governmental Consent.*

Other than the Court Order (hereinafter defined), no governmental orders, permissions, consents, approvals or authorizations are required to be obtained and no registrations or declarations are required to be filed in connection with the execution and delivery of this Agreement, the Collateral Documents or the Note.

2.12 *Taxes.*

The Borrower has filed all United States income tax returns and all state and municipal tax returns which are required to be filed, and have paid, or made provision for the payment of, all taxes which have become due pursuant

to said returns or pursuant to any assessment received by the Borrower, except such taxes, if any, as are being contested in good faith and as to which adequate reserves have been provided. The United States income tax liability of the Borrower has been paid for all taxable years up to and including the taxable year ending September 30, 1990.

2.13 *Use of Proceeds.*

The Borrower will apply the proceeds from the Loans as provided in Section 1.1 hereof. The Borrower does not own any "margin security" as such term is defined in Regulation G of the Board of Governors of the Federal Reserve System, as amended, except margin securities owned or which may be acquired by the Borrower which do not and would not in the aggregate constitute a substantial part of the assets of the Borrower. The Borrower will not use any part of the proceeds from the Loans to be made under this Agreement (1) directly or indirectly, to purchase or carry any such security or to reduce or retire any Indebtedness originally incurred to purchase any such security within the meaning of such Regulation T, U or X of such Board, or (2) for any other purpose not permitted by Section 7 of the Securities Exchange Act of 1934, as amended, or any of the rules and regulations respecting the extension of credit promulgated thereunder.

2.14 *Compliance with Law.*

The Borrower has, to the best of the knowledge and belief of the Borrower, complied with all applicable statutes, rules, regulations, orders and restrictions of any domestic or foreign

government or any instrumentality or agency thereof, having jurisdiction over the conduct of business or the ownership of its properties.

2.15 *Restrictions on Borrower.*

The Borrower is not a party to, or is bound by, any contract or agreement or instrument, or subject to any charter or other corporate restriction, materially and adversely affecting its business, property, assets, operations or condition, financial or otherwise.

2.16 *ERISA.*

The Borrower represents to Lender that it neither has nor maintains any employee pension benefit plan or other pension or retirement plan. Borrower covenants with Lender that no such plan will be created by or on behalf of Borrower without Lender's prior written consent. Such consent may be conditioned upon receipt by Lender of an amendment to this Agreement containing such covenants, representations and warranties as Lender deems necessary.

SECTION 3.

CLOSING CONDITIONS

Lender's obligation to make the Loan provided for in Section 1.1 shall, unless waived in writing by Lender, be subject to the performance by the Borrower prior to or at the Closing Date of all of its agreements theretofore to be performed under this Agreement, to the accuracy of its

representations and warranties contained in this Agreement, and to the satisfaction, prior to or concurrently with the closing of the Loan, of each of the following further conditions:

3.1 *Collateral and Collateral Documents.*

Lender is hereby granted, to the extent not heretofore granted to Lender, a first priority and perfected senior lien and security interest in all presently owned and hereafter acquired real and personal property, assets and rights of any kind and nature of Borrower, including all proceeds thereof, wherever located. The Collateral Documents, the Note and related certificates, and other documents as may be reasonably required by the Lender, in form and substance reasonably satisfactory to the Lender and its counsel, shall have been executed in proper form by such persons or parties as the Lender may request and delivered to the Lender.

3.2 *Real Estate and Other Property-Related Documents.*

Upon request by the Lender, the Borrower shall deliver to the Lender:

(a) An endorsement to the existing lender's title insurance policies with respect to the first mortgages upon the Restaurants now held by Lender, updating the coverage thereof to a current date and containing only such exceptions as are acceptable to Lender.

(b) Amendments, in proper and recordable form, to the existing first mortgages held by Lender upon the

properties described in *Exhibit C*, extending the first lien thereof to secure the Loan *pari passu* with the 1987 Loan.

(c) A pledge of the leases and licenses held by Borrower, as lessee or licensee, concerning real estate locations for the outdoor advertising signs owned by Borrower.

(d) A security agreement, guaranty, collateral assignment of leases and rents, and other documents necessary or appropriate to evidence and perfect all of the Collateral securing the Loan.

3.3 *Insurance Policies.*

The following insurance policies, or certificates of the existence of such policies shall be delivered to the Lender and each such policy (except the general liability policy) shall name the Lender as a lost payee and mortgagee and shall provide that such policy shall not be canceled or coverage reduced without at least 20 days prior notice to the Lender:

(A) A comprehensive general liability insurance policy in amounts satisfactory to the Lender against claims and liabilities for injury or damage to persons or property relating to the Collateral (excluding the billboard structures). Coverage for personal injury and for property damage shall be in amounts acceptable to the Lender.

(B) In the event that any of the Collateral is located within a flood plain, flood insurance in an amount equal to the full replacement value of such Collateral.

3.4 *Financial Statements.*

Copies of the audited financial statements of the Borrower as of September 30, 1991, and the unaudited interim monthly statement dated _____, 1991, together with a certificate of the chief financial officer of the Borrower to the effect that such audited financial statements of the Borrower are true and correct and fairly present, in conformity with generally accepted accounting principles, consistently applied, the financial position of the Borrower as of such dates and its income, results of operations and changes in its financial position for such dates and that as of the date of such certificate there are no undisclosed liabilities of the Borrower not reflected in the audited financial statements.

3.5 *UCC Financing Statements.*

The filing or recording, as determined by the Lender, of Uniform Commercial Code financing statements in a form acceptable to the Lender setting out the security interests of the Lender with respect to the Collateral granted under the Collateral Documents.

3.6 *Payment of Fees and Expenses.*

Borrower shall pay, not later than the Closing Date of the Loan, all costs and expenses incurred by the Lender in connection with the Loan, including, but not limited to, legal fees and expenses for Lender's counsel and recording and filing fees. Borrower's obligation to pay such costs and expenses shall be in addition to Borrower's payment of other

sums to Lender pursuant to the terms hereof, and shall be payable irrespective of whether the Loan closes.

3.7 *Corporate Documentation.*

Lender shall have received certified copies of the Borrower's Articles of Incorporation and By-Laws and certified copies of all corporate action taken by the Borrower to authorize the execution, delivery and performance of this Agreement, the Note and the Collateral Documents, and such other papers as the Lender may reasonably require.

3.8 *Court Order.*

The Court shall have entered an emergency Order approving this financing ("Court Order"), in substantially the form attached as *Exhibit H* and incorporated herein by reference. To the extent this Agreement and the Court Order are inconsistent, the terms of the Court Order shall control.

3.9 *Conditions Precedent to All Advances; Application for Advance.*

The obligation of Lender to make each advance on the Revolving Line of Credit Loan (including the initial advance) shall be subject to the further conditions precedent that on the date of such advance (i) the Lender shall have agreed, in its sole and absolute discretion, to extend the advance to Borrower (and, if Lender concludes not to make such advance, it will notify Borrower in writing within two (2) business days of such conclusion), (ii) the Court Order shall be in full force and effect and shall not have been modified

or amended in any respect without the written consent of Lender, and (iii) the following statements shall be true and Lender shall have received a certificate and application signed by a duly authorized officer of the Borrower, dated the date of such advance, stating that:

(A) The representations, warranties and covenants contained in Sections 2 and 4 are correct on and as of the date of such advance as though made on and as of such date,

(B) No event has occurred and is continuing, or would result from such advance, which constitutes an Event of Default or would constitute an Event of Default but for the requirement that notice be given or time elapse or both, and

(C) The proceeds of the particular request for advance will be used by Borrower only for the purposes stated therein.

SECTION 4.

BORROWER BUSINESS COVENANTS

AFFIRMATIVE COVENANTS. The Borrower covenants and agrees that so long as the Note shall be outstanding:

4.1 *Payment of Taxes and Claims.*

The Borrower will duly pay and discharge, as the same become due and payable, all taxes, assessments and governmental and other charges, levies or claims levied or imposed, which are, or which if unpaid might become, a lien or charge upon the franchises, properties, assets, earnings

or business of the Borrower; provided, however, that nothing contained in this paragraph shall require the Borrower to pay and discharge, or cause to be paid and discharged, any such tax, assessment, charge, levy or claim so long as the Borrower in good faith shall contest the validity thereof and shall set aside on its books adequate reserves with respect thereto.

4.2 *Maintenance of Corporate Existence and Properties.*

(A) *Corporate Existence and Rights.* The Borrower will at all times do or cause to be done all things necessary to maintain, preserve and renew its corporate existence and its rights, patents and franchises, and comply with, all related laws applicable to the Borrower in such manner as counsel shall advise.

(B) *Property.* The Borrower will at all times maintain, preserve, protect and keep, or cause to be maintained, preserved, protected and kept, its property, including, but not limited to, the Restaurants and all of Borrower's property constituting Collateral, in good repair, working order and condition and, from time to time, will make, or cause to be made, all repairs, renewals, replacements, extension, additions, betterments and improvements to its property as are needful and proper, so that the business carried on in connection therewith may be conducted properly and efficiently at all times.

(C) *Insurance.* At Borrower's expense, keep, or cause to be kept, (i) all of Borrower's property in which Lender has a lien or security interest (except for the billboards,

provided that worker's compensation insurance with respect to the billboards shall be required) insured against such risks as are satisfactory to Lender, and (ii) liability insurance in a minimum amount of $3,000,000, such insurance to be issued by companies acceptable to Lender and in amounts as the Lender may require and sufficient to satisfy all coinsurance requirements covering such property. Such insurance policies (except for the general liability policy) shall name the Lender as loss payee and mortgagee and shall provide that such policies shall not be canceled or coverages reduced without at least twenty (20) days prior written notice to the Lender. In the event of acquisition of additional insurable collateral, Borrower shall cause such insurance coverage to be increased or amended in such manner and to such extent as prudent business judgment would dictate. If Borrower shall at any time or tines hereafter fail to obtain and/or maintain any of the policies of insurance required herein, or fail to pay any premium in whole or in part relating to such policies, Lender may, but shall not be obligated to, obtain and/or cause to be maintained insurance coverage with respect to such Collateral, including, at Lender's option, the coverage provided by all or any of the policies of Borrower and pay all or any part of the premium therefor, without waiving any Default by Borrower, and any sums so disbursed by Lender shall be additional loans to Borrower by Lender payable on demand. Lender shall have the right to settle and compromise any and all claims under any of the policies required to be maintained by Borrower hereunder and Borrower hereby appoints Lender as its attorney-in-fact, with power to demand, receive, and receipt for all monies payable thereunder, to execute in the name of Borrower or Lender or both any proof of loss, notice, draft, or other instruments in

connection with such policies or any loss thereunder and generally to do and perform any and all acts as Borrower, but for this appointment, might or could perform.

(D) *Financial Records*. The Borrower will keep true books of records and account in which full and correct entries will be made of all its business transactions, and will reflect in its financial statements adequate accruals and appropriations to reserves, all in accordance with generally accepted accounting principles.

(E) *Compliance with Law*. The Borrower will comply with each and every term and condition of the Court Order and all applicable statutes, rules, regulations, orders and restrictions of the United States of America, foreign countries, states and municipalities, and of any governmental department, commission, board, regulatory authority, bureau, agency, and instrumentality of the foregoing, and of any court, arbitrator or grand jury, in respect of the conduct of its business and the ownership of its properties.

4.3 *Payment of Loan and Maintenance of Office*.

The Borrower will maintain an office at Chesterfield, Missouri, where notices, presentations and demands to or upon the Borrower in respect of the Loan and Note may be given or made.

The Borrower will punctually pay or cause to be paid the principal of, and premium, if any, and interest on, the Loan at the times and places and in the manner specified in this Agreement and in the Note.

4.4 *Further Action*.

The Borrower will take such further action as shall be necessary or appropriate to consummate and document fully the Loan as provided herein and as provided in the Court Order.

4.5 *Best Efforts*.

The Borrower agrees to undertake and diligently pursue its best efforts to develop and enhance the segment of its business concerning the rental of outdoor advertising signs and, to that end, to develop and submit to Lender its detailed business plan providing for such development and enhancement.

4.6 *Projections and Budget*.

The Borrower agrees to comply with the Projections (hereinafter defined) submitted to Lender, and further agrees that the use of proceeds from any advance made by Lender to Borrower shall be used by Borrower only for the purpose stated in the particular request for advance and only for a purpose that is consistent with the expenditures delineated in the Budget (hereinafter defined).

4.7 *Tax Refunds and Extraordinary Sale Proceeds*.

In the event the Borrower receives proceeds from the sale of any of its assets other than a sale in the ordinary course of its business, or any refund of state or federal income tax obligations, Borrower shall promptly notify Lender and shall

immediately apply said proceeds or refund to the reduction of the 1987 Loan.

NEGATIVE COVENANTS. Without the prior written consent of Lender, the Borrower covenants and agrees that so long as the Note shall be outstanding:

4.8 *Disposal of Stock of Borrower.*

The Borrower will not sell, assign, transfer, redeem, retire or otherwise dispose of more than fifty percent (50%) of any shares of stock of any class of the Borrower, without the prior written consent of the Lender. In addition, Borrower agrees not to permit any shareholder to sell, assign, transfer, redeem, retire or otherwise dispose of more than fifty percent (50%) of any shares of stock of any class of the Borrower, including, but not limited to, any shares owned by the Guarantor.

In addition, and not in limitation of the foregoing, William J. Dooner shall covenant in the Guaranty Agreement of even date herewith, not to sell, assign, transfer, or otherwise dispose of any stock of any class of Borrower now held or hereafter acquired either directly or indirectly, by William O. Dooner.

4.9 *Sale of Assets; Merger.*

(A) *Sale of Assets.* Other than in the ordinary course of its business, the Borrower will not sell, lease, transfer or otherwise dispose of, in any transaction or series of related transactions, all or any substantial part of its assets, whether

now owned or hereafter acquired. Borrower will also not sell or assign or lease any restaurant asset individually.

(B) *Merger of Consolidation.* The Borrower will not consolidate with or merge into any other corporation or permit any other corporation to merge into the Borrower.

4.10 *Sale and Leaseback.*

The Borrower shall not, after the sale of any property owned by the Borrower, rent or lease such property or substantially identical property.

4.11 *Liens and Encumbrances.*

The Borrower will not create or assume, or permit to exist, any mortgage, lien, charge or encumbrance on, pledge of, or other security interest in, any property or assets of any kind (real or personal, tangible or intangible) or acquire or agree to acquire any such property or assets under conditional sale agreements or other retention agreements, or sell any such property or assets subject to an understanding or agreement, contingent or otherwise, to repurchase such property or assets; (including sales of accounts receivable with recourse to the Borrower), or file or permit the filing of any financing statement under the Uniform Commercial Code or other similar notice under any other similar statute.

4.12 *Limitation on Loan.*

The Borrower shall not advance or lend any additional monies, extend credit, or property to any officer, insider,

Affiliate, stockholder or other related entities or related individuals or guaranty, assume, endorse, or otherwise become responsible for, directly or indirectly, obligations of others throughout the term of the Loan and any renewals thereof.

4.13 *Dividends.*

Borrower will not pay or declare any dividends or authorize any distribution of any stock of the Borrower or make any payment on account of the purchase, acquisition, redemption, or other retirement of any shares of stock; provided, however, if Borrower elects to report its income as an S Corporation under the Internal Revenue Code of 1986, as amended, dividends and other payments to shareholders shall not exceed the income tax liability incurred from the income that is reported to such shareholders from the Borrower.

4.14 *Transactions of Affiliates.*

The Borrower will not enter into any transaction including, without limitation, the purchase, sale or exchange of property or the rendering of any service, with any Affiliate except in the ordinary course of business and pursuant to the reasonable requirements of the Borrower's business and upon terms found by the Board of Directors to be fair and reasonable and no less favorable to the Borrower than would obtain in a comparable arm's-length transaction with a Person not an Affiliate.

4.15 *Management.*

The Borrower will not permit any voluntary change in the executive management of Borrower as constituted on the date hereof, and will notify Lender promptly upon a change in executive management.

4.16 *Minimum Earnings.*

The Borrower will achieve minimum earnings for the periods set forth below. For the purposes of this Section 4.16, the term "minimum earnings" means net income from ordinary operations of Borrower but before application of the expenses of interest on borrowed money, income taxes, and depreciation. The calculation of minimum earnings shall be in the manner that is consistent with the calculation utilized by Borrower in preparing the Budget and the Projections.

Period	Minimum Earnings
September, 1991	$50,000.00
October, 1991	$10,000.00
November, 1991	$ 1.00

SECTION 5.

INFORMATION AS TO BORROWER

5.1 *Financial and Business Information.*

So long as any Loan is outstanding, the Borrower will deliver to the Lender:

(A) *Monthly Financial Statements.* As soon as reasonably possible, and in any event within 20 days after the close of each month, (1) the balance sheets of the Borrower, as of the end of such month, setting forth in the case of the balance sheets, in comparative form the corresponding figures for the corresponding month of the preceding fiscal year, and (2) the profit and loss and surplus statements of the Borrower for such month and for the portion of the fiscal year ended with such month, setting forth in the case of the statements, in comparative form the corresponding periods of the preceding fiscal year, all in reasonable detail and certified by a principal financial officer of the Borrower, subject to normal year-end audit adjustments.

(B) *Annual Reports and Financial Statements.* As soon as reasonably possible, and in any event within 120 days after the close of each fiscal year of the Borrower (1) the balance sheets of the Borrower as at the end of fiscal year, setting forth, in the case of the balance sheets, in comparative form, the corresponding figures at the end of the preceding fiscal year, and (2) the profit and loss and surplus statements of the Borrower for such fiscal year, setting forth, in the

case of the statements, in comparative form, the corresponding figures for the previous fiscal year. Such balance sheets and statements shall be prepared in reasonable detail, in accordance with good accounting practice, and the statements shall be accompanied by a report and opinion of independent public accountants of recognized standing selected by the Borrower, which report and opinion shall be prepared in accordance with generally accepted auditing standards relating to reporting and shall include a statement that, in making the audit necessary for the certification of such financial statements and such report, such accountants have obtained no knowledge of any Event of Default under the Loan, Note or Collateral Documents (after first receiving certificates from Borrower and Lender in accordance with standard accounting practices) or under any other evidence of Indebtedness, or of any event which, with notice or lapse of time, or both, would constitute an Event of Default under this Agreement, the Loan, Note, or Collateral Documents, or under any other evidence of Indebtedness or, if in the opinion of such accountants, any such Event of Default or other event shall exist, shall include a statement as to the nature and status of such event. Such report shall also include such other reports, schedules or information as may be furnished to the Board of Directors of the Borrower in connection with such audit.

(C) *Special Reports of Accountants.* Promptly after the receipt thereof by the Borrower, copies of any detailed audit reports submitted to the Borrower by independent accountants in connection with the accounts, books, or any audit of the Borrower.

(D) *Notice of Default or Event of Default.* Immediately upon becoming aware of the existence of any condition or event which constitutes a default or an Event of Default a written notice specifying the nature and period of existence thereof and what action the Borrower is taking or proposes to take with respect thereto.

(E) *Projections.*

Cash flow projections ("Projections") prepared by Borrower showing projected cash receipts and cash expenditures, together with such additional relevant information and detail as requested by Lender, for the one year period commencing September 1, 1991, showing projections on a monthly basis. The Projections are attached as *Exhibit I.*

(F) *Budget.*

A budget ("Budget") prepared by Borrower showing budgeted income and expenses on an accrual basis, together with such additional relevant information and detail as requested by Lender, for the one year period commencing September 1, 1991, showing budgeted income and expenses on a monthly basis. The Budget is attached as *Exhibit J.*

(G) *Additional Information.* Such other data and information as from time to time may be reasonably requested by the Lender.

The Lender may deliver copies of any of the financial statements furnished to Lender pursuant to Section 5.1, as

well as copies of any other information or reports furnished to it pursuant to this Section 5.1 or any other provisions of this Agreement to any regulatory body, or to any agency, authority or commission, to whose jurisdiction the Lender may be subject.

5.2 *Officers' Certificates.*

Compliance Certificate. Not later than the time of delivery of the statements required to be furnished pursuant to Section 5.1(B), a certificate signed by the President or one of the Vice Presidents and the Treasurer or one of the Assistant Treasurers of the Borrower stating that a review of the activities of the Borrower during such fiscal year has been made under their supervision with a view to determining whether during such fiscal year the Borrower performed and observed all of its obligations under this Agreement, the Collateral Documents and the Note, and either (1) stating that to the best of their knowledge the Borrower had during such fiscal year performed and observed each covenant and condition of this Agreement, the Collateral Documents and the Notes applicable to them or (2), if the Borrower has not performed and observed such covenants and conditions, specifying all such Defaults and their nature and status.

5.3 *Inspection.*

The Borrower will permit any of the Lender's representatives, at the Lender's expense, to visit and inspect any of the properties of the Borrower, to examine all its books of account, records, reports and other papers, to make copies and extracts therefrom, and to discuss its affairs, finances

and accounts with its officers, employees and independent public accountants (and by this provision the Borrower authorizes said accountants to discuss the finances and affairs of the Borrower) all at such reasonable times and as often as may be reasonably requested.

SECTION 6.

EVENTS OF DEFAULT

6.1 *Nature of Events.*

An "Event of Default" shall exist if any of the following occurs:

(A) Any representation or warranty made herein or in any documents under which the Loan are made, including, but not limited to this Agreement, the Collateral Documents or the Note, shall prove to have been incorrect, or shall be breached, in any material respect; or

(B) Default in the payment when due of any principal or interest due on the Loan; or

(C) Default by the Borrower or the Guarantor in the performance of any provision, covenant or agreement specified herein, the Note or in any Collateral Documents; or

(D) A final judgment or judgments for the payment of money in excess of $50,000 in the aggregate shall have been rendered against the Borrower or the Guarantor and the same

shall have remained unappealed and unsatisfied and in effect, without stay of execution, for any period of sixty (60) days, provided, however such final judgment shall not constitute a default hereunder if Borrower or the Guarantor posts a bond or other form of security in an amount satisfactory to the Lender or such judgment or judgments are fully insured; or

(E) The Guarantor shall: (i) apply for or consent to the appointment of a receiver, trustee or liquidator of itself or its property; (ii) be unable, or admit in writing inability, to pay its debts as they mature; (iii) make a general assignment for the benefit of creditors; (iv) file a petition for an order of relief, or have such petition filed with respect to Guarantor in any court; or (v) file a voluntary petition in bankruptcy or a petition or answer seeking reorganization or an arrangement with creditors or to take advantage of any insolvency law or an answer admitting the material allegations of a petition filed against it in any bankruptcy, reorganization, arrangement or insolvency proceeding; or action shall be taken by them for the purpose of affecting any of the foregoing; or

(F) An order, judgment or decree shall be entered against the Guarantor without its application, approval or consent thereof, by any court or governmental agency of competent jurisdiction, approving a petition seeking reorganization of the Guarantor or appointing a receiver, trustee, liquidator or the like of the Guarantor or of all or a substantial part of its assets, and, if such order, judgment or decree is being contested in good faith, the same shall have continued unstayed and in effect for any period of sixty (60) consecutive days; or

(G) If any of the restaurant assets, other Collateral or any part thereof, is sold (other than in the ordinary course of business), transferred, leased, conveyed, hypothecated, pledged or otherwise encumbered (including, without limitation, encumbrances resulting from secondary financing) without the prior written consent of the Lender; or

(H) A material negative variance from the Projections or the Budget is permitted to occur; or

(I) An event of default in the 1987 Loan Agreement (except for noncompliance with covenants therein related to Borrower's financial condition); or

(J) The termination of the 1987 Loan Agreement or any guaranty thereunder other than by payment in full of all liabilities to Lender thereunder; or

(K) The conversion of the Reorganization Proceeding to a case under Chapter 7 of the Code; or

(L) The dismissal of the Reorganization Proceeding as a Chapter 11 case or any subsequent case under Chapter 7 of the United States Bankruptcy Code; or

(M) A violation of any provision of the Court Order; or

(N) If the Court Order shall be vacated, reversed, modified, stayed or amended in any respect; or

(O) If the Court enters an order approving a disclosure statement in connection with a plan of reorganization that does not provide for payment in full in cash of all of the indebtedness of Borrower to Lender (including indebtedness evidenced by the 1987 Loan Agreement and this Agreement) upon the effective date of such plan, unless the Lender agrees in writing to other treatment; or

(P) The appointment of a trustee for Borrower or the assets of Borrower.

6.2 *Remedies.*

(A) In case any one or more of the Events of Default specified above in this Section 6 shall have happened and be continuing, the Lender may proceed, subject to compliance with the terms of the Court Order, to protect and enforce its rights "either by suit in equity and/or by action at law, or by other appropriate proceedings, whether for the specific performance (to the extent permitted by applicable law or equitable principles) of any covenant or agreement contained in this Agreement, the Collateral Documents or the Note, or in aid of the exercise of any power granted in this Agreement, the Collateral Documents or the Note, or may proceed to enforce the payment of the Note or to enforce any other legal or equitable right of the Lender.

(B) In particular, without limiting the generality of the foregoing, the right to declare the entire principal of, and all interest accrued on, the Loan then outstanding to be, and such Loans, and the Note evidencing the Loan shall thereupon become, forthwith due and payable, without any

presentment, demand, protest or other notice of any kind, all of which are hereby expressly waived, and the Borrower will forthwith pay to the Lender the entire outstanding principal of, and interest accrued on, the Loan evidenced by the Note.

(C) In the event of the failure of Borrower to make the payment of money to Lender when due as provided in the Note or this Agreement, Lender, in its discretion, may advance the amounts due and endorse the Note to reflect such advance as an advance to Borrower under the Note, all without waiving any event of default on the part of the Borrower.

(D) No course of dealing on the part of the Lender or any delay or failure on the part of such holder to exercise any right shall operate as a waiver of such right or otherwise prejudice Lender's rights, powers and remedies. If the Borrower fails to pay when due the principal of, or interest on, the Loan, or fails to comply with any provision of this Agreement, the Collateral Documents or the Note, the Borrower will pay to the Lender, to the extent permitted by law, such further amounts as shall be sufficient to cover the cost and expenses, including but not limited to reasonable attorney's fees, incurred by the Lender in collecting any sums due on or on account of the Loan or in otherwise enforcing any of its rights.

SECTION 7.

INTERPRETATION OF THIS AGREEMENT

7.1 *Terms Defined.*

As used in this Agreement, the following terms have the respective meanings set forth below:

"Affiliate" shall mean any Person (other than a Subsidiary) (1) which directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with the Borrower, (2) 5% or more of the equity interest of which is held beneficially or of record by the Borrower or a Subsidiary. The term "control" means the possession, directly or indirectly, of the power to cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

"Board of Directors" shall mean either the board of directors of the Borrower or any duly authorized committee of that board.

"Indebtedness" shall mean and include, without duplication, (1) all items which, in accordance with good accounting practice, would be included on the liability side of a balance sheet as at the date as of which Indebtedness is to be determined excluding capital stock, surplus, capital and earned surplus, (2) all Indebtedness secured by any mortgage, pledge, security interest or lien existing on property owned subject to such

mortgage, pledge, security, interest or lien whether or not the Indebtedness secured thereby shall have been assumed, (3) all amounts representing the capitalization of rentals in accordance with good accounting practice, and (4) all guarantees, endorsements and other contingent obligations, including without limitation all Indebtedness guaranteed, directly or indirectly, in any manner, or in effect guaranteed or supported, directly or indirectly, through an agreement, contingent or otherwise, (a) to purchase or sell services at prices or in amounts designed to enable the debtor to make payment of the Indebtedness or to assure the owner of the Indebtedness against loss, or (b) to supply or advance funds to or in any other manner invest in the debtor, provided, however, that such term shall not mean and include any Indebtedness in respect to which moneys sufficient to pay and discharge the same in full (either on the expressed date of maturity thereof or on such earlier: date as such Indebtedness may be duly called for redemption and payment) shall be deposited with a depositary, agency or trustee in trust for the payment thereof.

"Person" shall include any individual, a corporation, a partnership, or a government, foreign or domestic, or any agency or political subdivision thereof.

"Prime Rate" meant the standard publicly announced prime rate of interest of the Lender.

"Subsidiary" shall mean any corporation more than 10% of the Outstanding Voting Stock of which is at the time

directly or indirectly owned by the Borrower, or by one or more of its Subsidiaries, or by the Borrower and one or more of its Subsidiaries and which has substantially all of its assets located within, and operates substantially entirely within, the United States of America or Canada.

"Termination Date" means the earliest of (i) three (3) months from the date hereof, (ii) the substantial consummation (as such term is defined in Section 1102(2) of the Code) of a plan of a reorganization of the Borrower, or (iii) the effective date of any plan of reorganization of the Borrower.

"Voting Stock" means common stock of any class or classes of a corporation the holders of which are ordinarily, in the absence of contingencies, entitled to elect a majority of the corporate directors (or Persons performing similar functions).

7.2 *Directly or Indirectly.*

Where any provision of this Agreement refers to action to be taken by any Person, or which such Person is prohibited from taking, such provision shall be applicable whether such action is taken directly or indirectly by such Person.

7.3 *Governing Law.*

This Agreement and the Loans shall be governed by, and construed and enforced in accordance with the law of Illinois.

7.4 *Section Headings and Construction.*

The titles of the Sections appear as a matter of convenience only and shall not affect the construction hereof. Each covenant contained in this Agreement shall be construed (absent an express contrary provision therein) as being independent of each other covenant contained herein and compliance with any one covenant shall not (absent such an express contrary provision) be deemed to excuse compliance with any or all other covenants.

SECTION 8.

AMENDMENT AND WAIVER

No term, covenant, agreement or condition of this Agreement may be amended, or compliance therewith waived (either generally or in a particular instance and either retroactively or prospectively), unless Borrower shall have obtained the agreement or consent in writing of the Lender.

SECTION 9.

MISCELLANEOUS

9.1 *Notices.*

(A) *Method; Address.* All communications under this Agreement shall be in writing, shall be personally delivered or deposited into the United States Mail (first class, registered or certified mail), postage prepaid, and shall be addressed,

(1) if to the Lender, at 10950 Lincoln Trail, Fairview Heights, Illinois 62208, Attention: Senior Vice President, or at such other address as the Lender shall have furnished to the Borrower in writing, or

(2) if to the Borrower, at 400 Chesterfield Center, Suite 650, St. Louis, Missouri 63017, or at such other address as the Borrower shall have furnished to the Lender in writing.

(B) *When Given.* Any notice so addressed and mailed by registered or certified mail shall be deemed to be given when so mailed. Any notice so addressed and otherwise delivered shall be deemed to be given when actually received by the addressee.

9.2 *Duplicate Originals.*

Two or more duplicate originals of this Agreement may be signed by the parties, each of which shall be an original but all of which together shall constitute one and the same instrument.

9.3 *Reproduction of Documents.*

This Agreement and all documents relating thereto, including, without limitation, (a) consents, waivers and modifications which may hereafter be executed, (b) documents received by the Lender at the closing of the Loans (except the Note), and (c) financial statements, certificates and other information previously or hereafter furnished to

the Lender, may be reproduced by the Lender by any photographic, photostatic, microfilm, micro-card, miniature photographic or other similar process. The Borrower agrees and stipulates that any such reproduction shall be admissible in evidence as the original itself in any judicial or administrative proceeding (whether or not the original is in existence and whether or not such reproduction was made in the regular course of business) and that any enlargement, facsimile or further reproduction of such reproduction shall likewise be admissible in evidence.

9.4 *Survival*

All warranties, representations, and covenants made by the Borrower herein or in any certificate or other instrument delivered by it or on its behalf under this Agreement shall be considered to have been relied upon by the Lender and shall survive the making of the Loans and delivery to the Lender of the Notes, regardless of any investigation made by the Lender or on its behalf. All statements in any such certificate or other instrument shall constitute warranties and representations by the Borrower hereunder.

9.5 *Successors and Assigns.*

This Agreement shall inure to the benefit of and be binding upon the successors and assigns of each of the parties. The provisions of this Agreement are intended to be for the benefit of any and all holders, from time to time, of the Notes and shall be enforceable by any such holder, whether or not an express assignment to such holder of rights under this Agreement has been made by the Lender or its successors or assigns.

9.6 *Non-Waiver.*

No course of dealing between the Borrower and the Lender or any other holder from time to time of the Note or any delay of failure on the part of the Lender or any other holder from time to time of the Note hereof in exercising any rights hereunder shall operate as a waiver of any rights of any holder, except to the extent expressly waived in writing by such holder.

IN WITNESS WHEREOF, the Borrower and the Lender have caused this Agreement to be executed as of the date and year first above written.

HEN HOUSE INTERSTATE, INC.,
A DELAWARE CORPORATION,
DEBTOR AND DEBTOR-IN-
POSSESSION, BORROWER

By:_____
Title:_____

LANDMARK BANK OF ILLINOIS,
LENDER

By:_____
Title:

EXHIBIT A

List of Restaurants Mortgaged to Lender

1. Champaign County, Illinois
2. Dewitt County, Illinois
3. Ford County, Illinois
4. Jackson County, Missouri
5. Laurel County, Kentucky
6. Madison County, Illinois
7. Marion County, Illinois
8. McLean County, Illinois
9. Morgan County, Indiana
10. Muncie (Delaware County), Indiana
11. St. Clair County, Illinois
12. Washington County, Illinois
13. Will County, Illinois

EXHIBIT B

PROMISSORY NOTE
(REVOLVING LINE OF CREDIT)

$300,000.00 _____, 1991

_____, ____

This Note is secured by, among other things, the Mortgage covering the Restaurants (as defined in the hereinafter defined Loan Agreement), which Mortgage was executed on _____, 1987, and recorded in the Office of Recorder of Deeds at _____, as amended by First Modification recorded at _____.

FOR VALUE RECEIVED, HEN HOUSE INTERSTATE, INC., a Delaware corporation (the "Borrower"), hereby promises to pay to the order of LANDMARK BANK OF ILLINOIS ("Landmark"), at its business office located at 10950 Lincoln Trail, Fairview Heights, Illinois 62208, or at such other place as the holder of this Note may designate in writing the principal sum of THREE HUNDRED THOUSAND DOLLARS ($300,000.00), or so much thereof as shall be advanced hereunder by Landmark to the Borrower as established by the records of Landmark, pursuant to and under a Post-Petition Loan Agreement, dated as of the date hereof (the "Loan Agreement"), together with interest thereon accruing from the date hereof at a rate equal to five percent (5%) per annum above the standard prime rate of interest announced as being charged by Landmark Bank, St. Louis, Missouri from time to time as adjusted simultaneously with any change in such prime rate. Interest

accrued on the principal amount of the loan from time to time advanced shall be payable by the Borrower to Landmark on __ of each week, commencing on _____, 1991 through and including the Termination Date as defined in the Loan Agreement, the maturity date hereof. Interest shall be calculated on the basis of the actual number of days elapsed in a year having 360 days. The principal amount of the loan advanced or readvanced from time to time, shall be repaid in accordance with the provisions of the Loan Agreement. Unless demand for payment is made pursuant to the terms of the Loan Agreement, all outstanding principal amounts unpaid shall be repaid on the maturity date.

All advances hereunder shall be endorsed on the reverse side hereof by Landmark or the holder hereof, and between the undersigned and Landmark or the holder such endorsements and the balances derived from such endorsements shall be presumed to reflect the amounts advanced hereunder and the then outstanding and unpaid balance of the sums advanced hereunder, exclusive of any accrued interest thereon.

FROM AND AFTER THE MATURITY OF THIS NOTE, WHETHER BY DEMAND OR OTHERWISE, TO THE EXTENT PERMITTED BY LAW, INTEREST ON THE UNPAID PRINCIPAL AND INTEREST ON THIS NOTE SHALL ACCRUE AT AN ANNUAL RATE EQUAL TO 3 PERCENTAGE POINTS OVER THE RATE OF INTEREST THAT WOULD OTHERWISE THEN BE PAYABLE ON THIS NOTE.

Payment of this Note is guaranteed by William J. Dooner (the "Guarantor"), pursuant to a Guaranty of even date

herewith (the "Guaranty"). This Note is further secured by Deeds of Trust and Mortgages from the Borrower to Landmark (collectively the "Mortgages"), a Security Agreement — Equipment, a Security Agreement — Accounts Receivable and Inventory, an Assignment of Rents, an Assignment of Contract Rights, a Pledge Agreement and an Assignment of Management Contract, all dated as of May 15, 1987 from the Borrower to Landmark, as amended by amendments of even date herewith.

The principal amount of this Note may be prepaid at any time, in whole or in part, without penalty. Any partial prepayment will be applied first against fees or charges due hereunder or under the Loan Agreement, then against interest and then against the principal of this Note. No partial prepayment will excuse any future payment of principal or interest as long as any amounts remain unpaid.

If a default occurs under the Loan Agreement, the Pledge Agreement, the Guaranty, the Term Note, the Assignment of Rents, the Assignment of Contract Rights or the Mortgages, this Note shall, without further notice, be immediately due and payable and the holder of this Note shall have the benefit of all the remedies set forth in the Loan Agreement, the Pledge Agreement, the Guaranty, the Mortgages, the Security Agreement — Equipment, the Security Agreement — Accounts Receivable and Inventory, the Assignment of Rents, the Assignment of Contract Rights and the Assignment of Management Contract as well as all other remedies at law or in equity.

UNLESS LANDMARK GIVES BORROWER WRITTEN NOTICE OF ITS WILLINGNESS TO EXTEND THE MATURITY DATE OF THIS NOTE THE HOLDER OF THIS NOTE SHALL NOT BE REQUIRED TO RENEW, EXTEND OR REFINANCE THIS NOTE OR ANY AMOUNTS DUE UNDER THIS NOTE.

The holder of this Note will not be required to accept any payment that is tendered more than ten (10) days past due, but if the holder does accept such payment, the undersigned will also pay a late charge of 5% of the amount past due. The undersigned will also pay all expenses of the holder hereof in collecting this Note, including, without limitation, all attorneys' fees whether or not litigation is commenced, and all costs and attorneys' fees relating to any insolvency, liquidation, receivership or bankruptcy proceedings.

Each maker, surety, endorser and guarantor of this Note hereby agrees that: (a) this Note may be modified or renewed one or more times and the time for payment of this Note or any renewal note may be extended without notice to or consent of any person obligated on this Note; (b) the holder of this Note may elect to enforce this Note against less than all of the persons directly or indirectly obligated hereon; (c) the holder hereof is not obligated to foreclose upon or exhaust any collateral given for this Note before proceeding against any person directly or indirectly obligated hereon; and (d) presentment, demand for payments, notice of nonpayment, protest, notice of protest, notice of dishonor, and all other notices in connection with this Note, filing of suit and diligence in collecting this Note, are waived.

This Note is governed by the laws of the State of Illinois. Each maker, surety, endorser and guarantor of this Note accepts the jurisdiction over such person and over this Note of any state and federal courts located in the State of Illinois as the holder hereof may reasonably designate.

IN WITNESS WHEREOF, the Borrower has caused this Note to be duly executed, attested and delivered as of the date and year first above written.

HEN HOUSE INTERSTATE, INC.,
a Delaware corporation

By:_____
Title:

ATTEST:
(SEAL)

By:_____
Title

* * *

EXHIBIT C

List of Restaurants Mortgaged to Lender

1. Champaign County, Illinois
2. Dewitt County, Illinois
3. Ford County, Illinois
4. Jackson County, Missouri
5. Laurel County, Kentucky
6. Madison County, Illinois
7. Marion County, Illinois
8. McLean County, Illinois
9. Morgan County, Indiana
10. Muncie (Delaware County), Indiana
11. St. Clair County, Illinois
12. Washington County, Illinois
13. Will County, Illinois

EXHIBIT D

CONTINUING UNLIMITED GUARANTY

FOR VALUABLE CONSIDERATION, the receipt of which is hereby acknowledged, and to induce LANDMARK BANK OF ILLINOIS (the "Lender") to make loans and advance credit to HEN HOUSE INTERSTATE, INC., a Delaware corporation ("Borrower") and in consideration of any such loan or advance of credit, the signer or signers hereof ("Guarantors" or a "Guarantor") jointly and severally, unconditionally guarantee full payment when due of all Liabilities (as hereinafter defined) of Borrower to the Lender. This shall be a continuing guaranty.

1. The term "Liabilities" or a "Liability" as used herein shall mean the indebtedness of Borrower to Lender under that certain promissory note in the original principal amount of $300,000 executed by Borrower of even date herewith and any extensions, renewals or refundings thereof (and extensions, renewals or refundings made after notice of termination or revocation hereof). "Liabilities" or a "Liability" shall also include expenses, including reasonable attorney's fees, incurred by the Lender in efforts to collect any Liability or to enforce the undertakings of Guarantors hereunder, whether or not litigation is commenced.

2. Each Guarantor waives notice of acceptance of this Guaranty, notice of extension, renewal, refunding of any Liability and the incurrence of an existing Liability and any Liability which has not yet actually accrued (the latter type of Liability being sometimes hereinafter referred to as an

"Inchoate Liability"). All Liabilities shall conclusively be presumed to have been created or accepted by the Lender in reliance on this Guaranty.

3. This Guaranty shall not supersede any earlier guaranty of Guarantors or any of them in which the Lender has an interest nor shall any later guaranty of Guarantors or any of them in which the Lender has an interest be construed to supersede this Guaranty. The effect of any earlier or later guaranty shall be cumulative with this Guaranty, and this shall be the case whether the interest of the Lender in such earlier or later guaranty derives from arrangements made directly with any Guarantor or indirectly by way of the Lender being a transferee of all or part of obligations of Borrower guaranteed by Guarantors or any of them.

4. The obligations of Guarantors hereunder shall apply to all Liabilities, including Inchoate Liabilities, arising prior to notice in writing from any Guarantor that such Guarantor will not be responsible for any further Liabilities or notice from a Guarantor's personal representative that such Guarantor has died or been adjudicated incompetent, and to any renewals, extensions, or other Liabilities arising out of the same, whether made prior to or after revocation of this Guaranty. Any such notice, to be effective, must be actually received by the Lender. Notwithstanding the giving of such notice, the obligations of the Guarantors shall continue in full force and effect as to all Liabilities then existing including Inchoate Liabilities and to any Liabilities thereafter arising, to the extent that the Lender may be bound or permitted by contract or otherwise to create or permit the creation of additional Liabilities including those which may

or might have been Inchoate Liabilities at the time such notice is given. Termination or revocation of this Guaranty by notice or by operation of law shall affect only the obligations of the Guarantor for or on behalf of whom such notice is given or as to whom such event occurs, the obligations of the other Guarantors to continue unabated.

5. It shall not be a condition to the obligations of Guarantors hereunder that the Lender pursue or preserve remedies against Borrower or any other party primarily or secondarily liable on any Liability or that the Lender enforce its rights against any collateral for any Liability, and Guarantors waive any requirement that the Lender so proceed. Guarantors shall have no right of subrogation to the rights of the Lender hereunder on account of payment by any of them of a Liability and hereby waive the right to participate in any security now or hereafter held by the Lender.

6. All payments received from Guarantors shall be deemed to have been made by Borrower unless the Lender is otherwise advised in writing by Borrower and Guarantors and any other Guarantors who may be obligated to the Lender on account of the Liabilities. Upon payment of the Liabilities in full, the Lender will cancel and assign and transfer all of the Liabilities to Borrower unless the Lender is otherwise instructed in writing by Borrower and all of the Guarantors and any other guarantors who may be obligated to the Lender on account of the Liabilities.

7. The Lender is authorized from time to time, without notice to or consent of the Guarantors (any requirement of

such notice or consent being waived by Guarantors) to renew, extend, refund or amend the terms of any Liability or any agreement pursuant to which any Liability is created or security therefor is held, in any manner to surrender, release, realize upon or deal with collateral for the Liabilities, exercise or refrain from exercising rights against Borrower or any Guarantor and to settle, release or otherwise enter into agreements regarding the Liabilities with any party primarily or secondarily liable on any Liability. The Lender may apply any collateral for the Liabilities in such order as it may elect and without any obligation to account to Guarantors or any of them for the manner or order of application.

8. The obligations of Guarantors hereunder shall not be impaired by failure on the part of the Lender to realize upon, perfect any interest in or protect any of the Liabilities or any security therefor, nor shall such obligations be impaired by any impairment, modification, change, release or limitation of any Liability resulting from the operation of any present or future provision of the Bankruptcy Code, as now existing or hereafter amended, or other similar statute, or applicable state law, or from the decision of any court. No invalidity, irregularity or unenforceability of any Liability shall be a defense to this Guaranty.

9. This Guaranty shall inure to the benefit of and may be enforced by the Lender, its successors and assigns and any party to whom all or any part of a Liability may be sold, transferred, negotiated or assigned. If all or part of a Liability is sold, transferred, negotiated or assigned, the Lender shall have the right to enforce this Guaranty as to the remainder.

10. Actions to enforce this Guaranty may be brought successively against one or more of the Guarantors jointly or severally and against less than all without impairing or affecting the rights of the Lender against the others. No release, with or without consideration, nor any action or inaction by the Lender as regards less than all of the Guarantors shall impair the rights of the Lender against the others. However, Guarantors agree among themselves that no release, compounding or settlement shall impair their rights as among themselves.

11. Guarantors and each of them understand and agree that this Guaranty will, unless expressly otherwise agreed, be secured by all collateral previously, now or hereafter pledged to the Lender by any Guarantor and any security interest previously, now or hereafter granted the Lender by any Guarantor whether such pledge or grant of security interest specifically relates to the Liabilities or not.

12. Guarantors and each of them understand and agree that in the event any payment made by or on behalf of Borrower respecting any Liability or any portion of any such payment shall at any time be repaid by the recipient in compliance with an order (whether or not final) by a court of competent jurisdiction pursuant to any provision of the United States Bankruptcy Code as now existing or hereafter amended or applicable state law, the Liabilities shall not be deemed to have been paid to the extent of the repayment so made, the obligations of Guarantors and each of them shall continue in full force and effect and such recipient, whether or not that be the Lender, will continue to be entitled to the full benefits of this Guaranty.

13. The word "Guarantors" as used herein refers to each of the undersigned, their respective heirs, legal representatives, successors and assigns and shall be read in the singular where the context otherwise requires.

14. This Guaranty contains all of the terms and conditions which have been agreed upon by the Lender and Guarantors in connection with this Guaranty and the indebtedness guaranteed hereby. Guarantors, and each of them, represent and warrant that no other oral or written representations, warranties, promises or agreements of any kind or nature whatsoever have been made by the Lender to Guarantors, or any of them, in connection herewith, either directly or indirectly, and Guarantors agree that the terms and conditions of this document may not be altered, modified or amended in any manner except by a writing duly executed by the Lender.

15. Guarantor covenants not to sell, assign or transfer any of the stock of Borrower now owned by Guarantor without the prior written consent of Lender.

16. This Guaranty shall be construed, interpreted and enforced in all respects in accordance with the laws of the State of Illinois (exclusive of its choice of law rules).

Dated as of this __ day of September, 1991.

_____

_____

_____

Home Address

EXHIBIT E

Legal Name of Borrower and all Subsidiaries	State of Incorporation	States in Which Borrower and Subsidiaries Conduct Business	List of Stock of Each Class	Number of Shares of Stock of Each Class Outstanding	Shares of Each Class Owned as of the Closing Date by Borrower and Each Subsidiary
Hen House Interstate, Inc.	Delaware	Illinois, Indiana, Kansas, Kentucky, Missouri	Common	450	

EXHIBIT F

DESCRIPTION OF
BUSINESS/PROPERTIES/OUTSTANDING
INDEBTEDNESS

Borrower/ Subsidiary	Brief Description of Business	List of Properties (attach schedule if necessary)	List of Outstanding Indebtedness (attach schedule if necessary)
Hen House Interstate, Inc.	Operation of family Restaurants with gift shops in Illinois, Kansas, Kentucky and Missouri. Also operates six service stations in conjunction with restaurant locations.	(SEE ATTACHED SCHEDULE)	

EXHIBIT F — DESCRIPTION
OF RESTAURANT LOCATIONS

I-64 and State Route 177
Okawville, IL 62271
Washington County, IL

2413 North 89th Street
Caseyville, IL 62232
St. Clair County, IL

1232 West State Route 32
Lebanon, IN 46052
Boone County, IN

I-57 and Peotone Road
Peotone, IL 60468
Will County, IL

I-70 and Stilesville Road
Stilesville, IN 46190
Morgan County, IN

I-65 and U.S. 50
Seymour, IN 47274
Jackson County, IN

I-75 and U.S. 25 East
Corbin, KY 40701
Laurel County, KY

6085 Air-Cap Drive
Wichita, KS 67219
Sedgewick County, KS

810 Stadium Drive
Jefferson City, MO 65101
Cole County, MO

I-29 and U.S. 136
Rock Port, MO 64482
Atchison County, MO

#19 Highway 109
Eureka, MO 63025
St. Louis County, MO

I-70 and Buckner-Tarsney Road
Grain Valley, MO 64029
Jackson County, MO

I-74 and State Route 47
Mahomet, IL 61853
Champaign County, IL

I-57 and U.S. 45
Pesotum, IL 61863
Champaign County, IL

I-70 and Martinsville Road
Martinsville, IL 62442
Clark County, IL

U.S. 150 and State Route 54
Farmer City, IL 61842
DeWitt County, IL

547 East Adams
Arcola, IL 61910
Douglas County, IL

I-57 and State Route 9
Paxton, IL 60957
Ford County, IL

I-55 and Exit 41
Staunton, IL 62088
Macoupin County, IL

I-55 and Gardner Road
Gardner, IL 60424
Grundy County, IL

I-57 and State Route 161
Centralia, IL 62801
Marion County, IL

1250 East Chain of Rocks Road
Mitchell, IL 62040
Madison County, IL

Route 66 and 24
Chenoa, IL 61726
McLean County, IL

112 East Washington Street
Carlock, IL 61725
McLean County, IL

6008 South 6th Street
Springfield, IL 62703
Sangamon County, IL

I-55 and Exit 80
Divernon, IL 62530
Sangamon County, IL

EXHIBIT G

List of all lien creditors

See schedules filed in Reorganization Proceedings

EXHIBIT H

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Proceedings Under Chapter 11

Case No. 91-45623-293

Motion E

In Re:

HEN HOUSE INTERSTATE, INC.,

Debtor.

EMERGENCY ORDER AUTHORIZING DEBTOR TO OBTAIN POST-PETITION SECURED CREDIT, GRANTING SENIOR LIENS AND ADMINISTRATIVE PRIORITY EXPENSE, MODIFYING AUTOMATIC STAY, PROVIDING ADEQUATE PROTECTION AND AUTHORIZING AGREEMENTS WITH LANDMARK BANK OF ILLINOIS

This matter is before the Court on Debtor's *Emergency Motion For Order Authorizing Debtor to Obtain Post-Petition Financing Pursuant to 11 U.S.C. §364, to Utilize Cash Collateral Pursuant to 11 U.S.C. §363, and Granting Adequate Protection to Pre-Petition Secured Party* (the "Debtor's Motion") filed by the above Debtor and on the

Emergency Motion for Relief From Automatic Stay or, in the Alternative for Adequate Protection, and for Order Denying Use of Cash Collateral and Requiring Segregation and Accounting of Cash Collateral (the "Landmark Motion") filed by Landmark Bank of Illinois ("Landmark"), Debtor and Landmark having agreed to the entry of this Order, the relief granted hereby and the terms and conditions herein set forth, and on the basis of representations made and testimony received from the Debtor, and upon the record in these Chapter 11 proceedings, the Court finds and determines that it is in the best interests of Debtor's estate and its creditors and that there is good cause to grant the emergency relief requested in the Debtor's Motion and the Landmark Motion herein provided. The Court finds that the Debtor does not otherwise have funds available to meet payroll and other necessary expenses, that the Debtor is unable to obtain credit other than on the basis provided herein, that the ability of the Debtor to continue its business, remain a viable entity and have an opportunity to reorganize under Chapter 11 of the Bankruptcy Code depends on obtaining post-petition secured financing from Landmark on the terms provided herein, and that absent the relief provided herein, Debtor's estate would suffer immediate and irreparable harm. The Court finds that the notice hereof having been provided is, under the circumstances, adequate and sufficient and complies with the requirements of 11 U.S.C. §§102(1) and 361 through 364 and Bankruptcy Rule 4001, and any notice periods in excess hereof are hereby shortened to conform to the notices given herein. The Court further finds that Debtor and Landmark have acted in good faith (as used in §364(e) of the Bankruptcy Code) with respect to the extension of credit authorized pursuant to this Order and all other aspects

of this Order, and that the relief requested and the terms and conditions set forth herein are in the best interests of Debtor's estate and its creditors.

ACCORDINGLY, IT IS, HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334, as this matter arises in the Chapter 11 case of Debtor. No trustee has been appointed and Debtor has remained in possession of its estate.

2. Landmark is the holder of a certain revolving line of credit note, executed and delivered by the Debtor as of June 2, 1987 in consideration of a loan by Landmark to the Debtor, wherein the Debtor promised to pay to Landmark the principal sum of $350,000.00 with interest thereon, as more fully set forth therein (the "Revolving Note"). A true and correct copy of the Revolving Note has been filed by Landmark under separate cover as Exhibit 1 to the Landmark Motion and is incorporated herein by reference.

3. Landmark is the holder of a certain term promissory note, executed and delivered by the Debtor as of June 2, 1987 in consideration of a loan by Landmark to the Debtor, wherein the Debtor promised to pay to Landmark the principal sum of $4,460,000.00 with interest thereon, as more fully set forth therein (the "Term Note"). A true and correct copy of the Term Note has been filed by Landmark under separate cover as Exhibit 2 to the Landmark Motion and is incorporated herein by reference.

4. Landmark is the holder of a certain promissory note, executed and delivered by the Debtor as of March 31, 1991 in consideration of a loan by Landmark to the Debtor, wherein the Debtor promised to pay to Landmark the principal sum of $53,000.00 with interest thereon as more fully set forth therein (the "Promissory Note"). A true and correct copy of the Promissory Note has been filed by Landmark under separate cover as Exhibit 3 to the Landmark Motion and is incorporated herein by reference.

5. The Revolving Note and Term Note were amended pursuant to a First Amendment to Promissory Notes ("First Amendment to Notes") dated December 28, 1990. A true and correct copy of the First Amendment to Notes is filed contemporaneously herewith under separate cover as Exhibit 4 and incorporated herein by reference. The Revolving Note, Term Note, First Amendment to Notes and Promissory Note are hereinafter collectively referred to as the "Notes").

6. In connection with the execution of the Notes, the Debtor and Landmark entered into a loan agreement executed May 15, 1987 (the "Original Loan Agreement"). A true and correct copy of the original Loan Agreement has been filed by Landmark under separate cover as Exhibit 5 to the Landmark Motion and is incorporated herein by reference.

7. The Loan Agreement was amended pursuant to a First Amendment to Loan Agreement ("Loan Agreement Amendment #1") dated December 28, 1990. A true and correct copy of the Loan Agreement Amendment #1 has been filed by Landmark under separate cover as Exhibit 6 to the Landmark Motion and is incorporated herein by reference.

8. The Loan Agreement was again amended pursuant to a Second Amendment to Loan Agreement ("Loan Agreement Amendment #2") dated March 31, 1991. A true and correct copy of the Loan Agreement Amendment #2 is filed contemporaneously herewith under separate cover as Exhibit 7 and incorporated herein by reference. The original Loan Agreement, Loan Agreement Amendment #1 and Loan Agreement Amendment #2 are hereinafter collectively referred to as the "Loan Agreement."

9. The Debtor executed and delivered to Landmark the following documents in order to secure the repayment of all obligations of Debtor to Landmark:

a. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 1524, Page 727 in the records of the Recorder's Office of the County of Champaign, State of Illinois (the "Champaign County Mortgage"), which encumbers certain premises in the County of Champaign, State of Illinois, described more fully therein (the "Champaign County Premises"). A true and correct copy of the Champaign County Mortgage has been filed by Landmark under separate cover as Exhibit 8 to the Landmark Motion and is incorporated herein by reference.

b. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 148, Page 320 in the records of the Recorder's Office of the County of DeWitt, State of Illinois (the "DeWitt County Mortgage"), which encumbers certain premises in the County of DeWitt, State of Illinois, described more fully

therein (the "DeWitt County Premises"). A true and correct copy of the DeWitt County Mortgage has been filed by Landmark under separate cover as Exhibit 9 to the Landmark Motion and is incorporated herein by reference.

c. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number 180011 in the records of the Recorder's Office of the County of Ford, State of Illinois (the "Ford County Mortgage"), which encumbers certain premises in the County of Ford, State of Illinois, described more fully therein (the "Ford County Premises"). A true and correct copy of the Ford County Mortgage has been filed by Landmark under separate cover as Exhibit 10 to the Landmark Motion and is incorporated herein by reference.

d. Deed of Trust given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number 1775025 at 11683P2261 et. seq. in the records of the Recorder's Office of the County of Jackson, State of Missouri (the "Jackson County Deed"), which encumbers certain premises in the County of Jackson, State of Missouri, described more fully therein (the "Jackson County Premises"). A true and correct copy of the Jackson County Deed has been filed by Landmark under separate cover as Exhibit 11 to the Landmark Motion and is incorporated herein by reference.

e. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 173, Page 518 in

the records of the Recorder's Office of the County of Laurel, State of Kentucky (the "Laurel County Mortgage"), which encumbers certain premises in the County of Laurel, State of Kentucky, described more fully therein (the "Laurel County Premises"). A true and correct copy of the Laurel County Mortgage has been filed by Landmark under separate cover as Exhibit 12 to the Landmark Motion and is incorporated herein by reference.

f. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 3423, Page 1266 in the records of the Recorder's Office of the County of Madison, State of Illinois (the "Madison County Mortgage"), which encumbers certain premises in the County of Madison, State of Illinois, described more fully therein (the "Madison County Premises"). A true and correct copy of the Madison County Mortgage has been filed by Landmark under separate cover as Exhibit 13 to the Landmark Motion and is incorporated herein by reference.

g. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 399, Page 485 in the records of the Recorder's Office of the County of Marion, State of Illinois (the "Marion County Mortgage"), which encumbers certain premises in the County of Marion, State of Illinois, described more fully therein (the "Marion County Premises"). A true and correct copy of the Marion County Mortgage is filed contemporaneously herewith under separate cover as Exhibit 14 and incorporated herein by reference.

h. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number 87-10253 in the records of the Recorder's Office of the County of McLean, State of Illinois (the "McLean County Mortgage"), which encumbers certain premises in the County of McLean, State of Illinois, described more fully therein (the "McLean County Premises"). A true and correct copy of the McLean County Mortgage has been filed by Landmark under separate cover as Exhibit 15 to the Landmark Motion and is incorporated herein by reference.

i. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 374, Page 247 in the records of the Recorder's Office of the County of Morgan, State of Indiana (the "Morgan County Mortgage"), which encumbers certain premises in the County of Morgan, State of Indiana, described more fully therein (the "Morgan County Premises"). A true and correct copy of the Morgan County Mortgage has been filed by Landmark under separate cover as Exhibit 16 to the Landmark Motion and is incorporated herein by reference.

j. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 1987, Page 7516 in the records of the Recorder's Office of the County of Delaware, State of Indiana (the "Delaware County Mortgage"), which encumbers certain premises in the County of Delaware, State of Indiana, described more fully therein (the "Delaware County Premises"). A true and correct copy of the Delaware County Mortgage has

been filed by Landmark under separate cover as Exhibit 17 to the Landmark Motion and is incorporated herein by reference.

k. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 2676, Page 1130 in the records of the Recorder's Office of the County of St. Clair, State of Illinois (the "St. Clair County Mortgage"), which encumbers certain premises in the County of St. Clair, State of Illinois, described more fully therein (the "St. Clair County Premises"). A true and correct copy of the St. Clair County Mortgage has been filed by Landmark under separate cover as Exhibit 18 to the Landmark Motion and is incorporated herein by reference.

l. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number 167252 in Book 367, Page 345 in the records of the Recorder's Office of the County of Washington, State of Illinois (the "Washington County Mortgage"), which encumbers certain premises in the County of Washington, State of Illinois, described more fully therein (the "Washington County Premises"). A true and correct copy of the Washington County Mortgage has been filed by Landmark under separate cover as Exhibit 19 to the Landmark Motion and is incorporated herein by reference.

m. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number R87-28965 in the records of the Recorder's Office of

the County of Will, State of Illinois (the "Will County Mortgage"), which encumbers certain premises in the County of Will, State of Illinois, described more fully therein (the "Will County Premises"). A true and correct copy of the Will County Mortgage has been filed by Landmark under separate cover as Exhibit 20 to the Landmark Motion and is incorporated herein by reference.

n. Collateral Pledge Agreement by the Debtor to Landmark dated May 15, 1987 (the "Collateral Pledge") wherein Debtor pledged to Landmark a certificate of deposit and other items as more fully described therein. A true and correct copy of the Collateral Pledge has been filed by Landmark under separate cover as Exhibit 21 to the Landmark Motion and is incorporated herein by reference.

o. Security Agreement-Equipment by the Debtor to Landmark dated May 15, 1987 (the "Equipment Security Agreement") wherein the Debtor granted to Landmark a security interest in furniture, fixtures, equipment, and machinery of every kind and nature, as more fully set forth in the Equipment Security Agreement. A true and correct copy of the Equipment Security Agreement has been filed by Landmark under separate cover as Exhibit 22 to the Landmark Motion and is incorporated herein by reference.

p. Security Agreement (Inventory-Accounts Receivable) by the Debtor to Landmark dated May 15, 1987 (the "Inventory Security Agreement") wherein the

Debtor granted to Landmark a security interest in the Debtor's inventory and accounts receivable as more fully set forth in the Inventory Security Agreement. A true and correct copy of the Inventory Security Agreement has been filed by Landmark under separate cover as Exhibit 23 to the Landmark Motion and is incorporated herein by reference.

q. Assignment of Interest in Contracts and Leases by the Debtor to Landmark dated May 15, 1987 (the "Contracts/Leases Assignment") wherein the Debtor assigned to Landmark all of the Debtor's right, title and interest in and to all contracts, permits, licenses, easements and leases, as more fully described therein. A true and correct copy of the Contracts/Leases Assignment has been filed by Landmark under separate cover as Exhibit 24 to the Landmark Motion and is incorporated herein by reference.

r. Assignment of Contract Rights by the Debtor to Landmark dated May 15, 1987 (the "Contract Rights Assignment") wherein the Debtor granted to Landmark a security interest in all of the Debtor's rights under a Management Services Agreement between the Debtor and Omni Outdoor Advertising, Inc. as more fully described therein. A true and correct copy of the Contract Rights Assignment has been filed by Landmark under separate cover as Exhibit 25 to the Landmark Motion and is incorporated herein by reference.

10. The Champaign County Mortgage, DeWitt County Mortgage, Ford County Mortgage, Jackson County Deed,

Laurel County Mortgage, Madison County Mortgage, Marion County Mortgage, McLean County Mortgage, Morgan County Mortgage, Delaware County Mortgage, St. Clair County Mortgage, Washington County Mortgage, Will County Mortgage, Collateral Pledge, Equipment Security Agreement, Inventory Security Agreement, Contracts/Lease Assignment and Contract Rights Assignment are hereinafter collectively referred to as the "Collateral Documents." The Notes, the Loan Agreement and the Collateral Documents are hereinafter sometimes collectively referred to as the "Loan Documents."

11. Perfection of Landmark's security interests granted in the Collateral Documents, was effectuated *inter alia* by the filing of Uniform Commercial Code Financing Statements with the offices and in the indexes as noted thereon (the "Filings"). True and correct copies of the Filings has been filed by Landmark under separate cover as Exhibit 26 to the Landmark Motion and is incorporated herein by reference.

12. Pursuant to the Loan Documents, Debtor promised to pay all costs of collection of Landmark incurred in connection therewith, including, without limitation, reasonable costs, fees, attorneys' fees and expenses.

13. Debtor is in default of its obligations to Landmark under the Loan Documents.

14. As of the date Debtor filed its petition herein (the "Filing Date"), Debtor was indebted to Landmark in the

aggregate amount of $4,139,676.57, plus accruing interest,[1] costs, expenses and fees of collection (the "Indebtedness"). The validity and priority of the Indebtedness and the liens and security interests securing the Indebtedness are not subject to any setoff, recoupment, counterclaim, avoidance or other challenge or attack of any kind or nature. The Indebtedness is hereby allowed as a secured claim.

15. All of Debtor's cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents, proceeds, products, rents, or profits derived from Debtor's business or any other property subject to Landmark's security interests, whether existing before or after the Filing Date, constitute "cash collateral" pursuant to 11 U.S.C. §363 and is subject to the duly perfected liens of Landmark (the "Cash Collateral").

16. Substantially all real and all personal property of Debtor, including its fixtures, accounts, Cash Collateral, inventory, machinery, equipment, real estate and personal property of any nature whatsoever (collectively the "Collateral") is encumbered by and subject to the first priority, perfected liens of Landmark pursuant to the duly executed Loan Documents as security for repayment of the Indebtedness.

17. Pursuant to 11 U.S.C. §363, Debtor is prohibited from using, selling or leasing the Collateral for any purpose unless Landmark consents or the Court, after notice and a

1. Interest has been calculated at the pre-default rate. This Order shall be without prejudice to Landmark's right to claim interest at the default rates specified in the Loan Documents.

hearing, authorizes such use, sale, or lease in accordance with the provisions of 11 U.S.C. §363.

18. Pursuant to 11 U.S.C. §363(c)(4), Debtor is required to segregate and account for all Cash Collateral in its possession, custody or control.

19. 11 U.S.C. §363(e) requires that notwithstanding any other provision of said section, upon Landmark's request, the Court, with or without a hearing, shall prohibit or condition Debtor's use, sale, or lease of any Collateral as is necessary to provide adequate protection of Landmark's interests therein.

20. Except upon further Order of this Court or upon default hereunder, Debtor, as debtor-in-possession, may continue to operate its business and to collect the cash, rents, profits and proceeds generated therefrom, limited solely to the ordinary course of business and in accordance with the provisions of this Order and the Bankruptcy Code.

21. All cash, cash equivalents, rents, profits, proceeds and income collected by the Debtor or on the Debtor's behalf shall be deposited and maintained at all times in a debtor-in-possession bank account(s) at Landmark (the "DIP Accounts") in accordance with 11 U.S.C. §345 and shall not be commingled with any other funds derived from any source whatsoever that do not constitute "Cash Collateral" under the terms of this Order.

22. Except as expressly permitted herein, Debtor shall not use any Cash Collateral in its possession, custody or

control at any time, and any cash previously or hereafter received by or on behalf of Debtor immediately shall be delivered to Landmark and used in accordance with the terms of the Post-Petition Loan Agreement (the "Post-Petition Loan Agreement") attached as Exhibit A to the Debtor's Motion and in accordance with the terms of this Order.

23. Debtor is hereby authorized pursuant to 11 U.S.C. §364 to enter into and execute the Post-Petition Loan Agreement, and all documents required thereby or in connection therewith, and borrow funds from Landmark pursuant thereto and pursuant to this Order. The Debtor is hereby immediately authorized to borrow pursuant to the Post-Petition Loan Agreement up to the amount of $50,000, which authorization is without prejudice to the Debtor's request for authorization at the final hearing on this matter to borrow up to the balance of the financing available under the Post-Petition Loan Agreement. The indebtedness incurred under the Post-Petition Loan Agreement shall be secured and collateralized as provided herein. All amounts advanced under the Post-Petition Loan Agreement shall constitute post-petition loans (the "Post-Petition Loans") by Landmark to, and debts of, Debtor bearing interest at the rate provided therein. All obligations described herein, including the Indebtedness and the Post-Petition Loans, are hereby ordered and adjudicated to be binding and enforceable obligations of the Debtor. The Post-Petition Loans shall mature and become immediately due and payable upon the earliest of (i) default hereunder, (ii) default under the Post-Petition Loan Agreement or (iii) the maturity date specified in the Post-Petition Loan Agreement (or any extended maturity date that may be agreed to in writing by Landmark), at which time

the Indebtedness, the Post-Petition Loans and all other obligations of the Debtor to Landmark shall be immediately due and payable. Landmark's obligation to make advances pursuant to the Post-Petition Loan Agreement shall at all times be entirely discretionary on Landmark's part, and in any event shall terminate upon Debtor's default hereunder or upon maturity of the Post-Petition Loans unless the maturity of the Post-Petition Loans is extended, or the Post-Petition Loans are renewed, as hereinafter provided. Landmark may, in its sole discretion, elect to extend the maturity of the Post-Petition Loans, but Landmark shall have no obligation whatsoever to so extend.

24. Subject to the terms hereof and Debtor's compliance herewith, Debtor is hereby authorized to use the Cash Collateral and the proceeds of the Post-Petition Loans for the amounts set forth in the budget attached hereto and incorporated herein by reference as Attachment 1 (the "Budget") for use solely for the payment of the expenses to the extent set forth in the Budget. Notwithstanding the foregoing, except for the $100,000 retainer of the Debtor's attorneys ($20,000 of which shall be deposited with the Debtor's attorneys upon entry of this Order and the remaining $80,000 of which shall be deposited with the Debtor's attorneys upon entry of a final order approving in all respects the terms of this Order), the expenses designated in the Budget shall be limited to post-Filing Date expenses incurred in the ordinary course of Debtor's business, except as expressly authorized by separate Orders of this Court. Except as specifically authorized herein or by separate Orders of this Court, no transactions with, funds or payments to, or commitments to pay, any insider (except normal, reasonable

salaries), affiliate or related entity of, or controlled (directly or indirectly) by Debtor, shall be made, paid or disbursed by Debtor to any such insider, affiliate or related entity.

25. Debtor shall pay or cause to be paid all ordinary and necessary expenses of operation of its business and the costs required to care for, preserve and maintain the Collateral, which are allowed in the Budget, including, but not limited to, the following:

a. Utility costs and telephone charges;

b. Reasonable salaries to employees of Debtor;

c. Upkeep, maintenance and repairs;

d. Insurance so as to assure continued coverage of the Collateral in accordance with the Loan Documents;

e. Purchase or rental of necessary supplies and equipment;

f. Income, withholding, sales, use, real estate and other taxes, operating permit fees and other charges necessarily incurred in the ordinary course of the Debtor's business.

26. In order to protect Landmark against a decline in the value of its secured position in the Collateral, and to afford such other adequate protection as is required under the Bankruptcy Code:

a. The Debtor shall operate its business pursuant to the terms herein set forth and shall perform all of the obligations hereunder.

b. Landmark is hereby granted, to the extent not heretofore granted, a first, priority and perfected senior lien and security interest in all presently owned and hereafter acquired real and personal property, assets and rights of any kind and nature of Debtor, including all proceeds thereof, wherever located, to secure the Indebtedness, the Post-Petition Loans and all other obligations of the Debtor to Landmark, including interest, fees and expenses thereon. In accordance with 11 U.S.C. §507(b), to the extent the value of Landmark's security interests in the Collateral declines after entry of this Order notwithstanding the adequate protection herein set forth, or such adequate protection otherwise proves to be inadequate, said liens and security interests shall have priority over all administration expenses of any kind as provided in 11 U.S.C. §364(c)(1), and, pursuant to 11 U.S.C. §364(c), shall be first and prior liens on the aforesaid property, assets and rights of Debtor. Proceeds from the liquidation of any Collateral shall be applied to the Indebtedness and the Post-Petition Loans in such manner and order as Landmark, in its sole discretion, shall elect.

c. Except as specifically modified herein with respect to payment, or under applicable provisions of the Bankruptcy Code, Debtor shall comply with all terms and provisions of the Loan Documents. Landmark's waiver of the breach of any covenant set forth in the

Loan Documents shall not be deemed a waiver of any subsequent defaults or remedies to which Landmark may be entitled.

d. Landmark is hereby granted the right and is authorized to enter upon, occupy and use any or all of the premises of the Debtor as is reasonable upon prior notice to the Debtor, as Landmark may deem necessary or appropriate, in Landmark's sole discretion, in connection with the exercise of any of Landmark's rights and remedies under the Loan Documents and/or the Post-Petition Loan Agreement, including, without limitation, liquidation of the Collateral.

e. Debtor immediately and continuously shall use its best efforts to market for sale as a going concern the outdoor billboard advertising business of the Debtor, and the proceeds from any such sale immediately shall be paid to Landmark at the closing of such sale for application toward reduction of the Indebtedness.

f. Proceeds from all non-ordinary course of business sales of assets of the Debtor immediately shall be paid to Landmark at the closing(s) of such sales for application toward reduction of the Indebtedness.

g. The automatic stay of 11 U.S.C. §362(a) is hereby modified to the extent necessary to permit Landmark to receive all proceeds from asset sales of the Debtor and apply the same toward reduction of the Indebtedness. Furthermore, the automatic stay is hereby vacated in all respects as to Landmark for the enforcement of

Landmark's rights with respect to the creation, perfection and implementation of Landmark's pre-petition and post-petition liens and security interests in the Collateral.

h. At such time as Landmark is entitled to exercise any remedy with respect to one or more items of Collateral, whether as a result of a default by Debtor or otherwise, the Debtor (or a trustee if one shall have been appointed) shall, at Landmark's request (A) immediately arrange, and diligently pursue to conclusion, a sale or sales, pursuant to 11 U.S.C. §363 free and clear of all liens, claims, encumbrances and interests, of such Collateral designated by Landmark, with Landmark to retain its right to credit bid all or any portion of the Debtor's obligations to Landmark, or (B) immediately transfer (by deed in lieu of foreclosure or other similar conveyance) to Landmark such Collateral designated by Landmark for a credit bid in an amount to be approved by the Court as fair and reasonable.

27. Subject to the terms hereof, Debtor shall sell or dispose of its inventory, products and supplies and shall operate its business only in the ordinary course of business in compliance with the provisions of the Bankruptcy Code and upon the terms and conditions usual and customary in such business, and shall deposit the proceeds of such operations only in the DIP Accounts.

28. Landmark's authorized representatives shall be given continuous reasonable access at all times to any and all operating personnel, books, records, information and documents of Debtor relating to the operation of Debtor's business and Debtor's financial dealings.

29. Debtor shall furnish or otherwise cause to be furnished to Landmark all such documents and reports as are required by the Loan Documents and the Post-Petition Loan Agreement at such times and in such a manner as are required by the Loan Documents and the Post-Petition Loan Agreement. In addition, the Debtor shall provide Landmark with copies of all schedules and statements of affairs, operating reports, and other financial information, if any, at any time filed in these proceedings by the Debtor.

30. Debtor is authorized and directed to reimburse Landmark promptly for all present and future costs and expenses incurred by Landmark to effectuate the financing transactions as provided in the Loan Documents, the Post-Petition Loan Agreement and/or this Order, including, but not limited to, audit expenses, field examination expenses, title insurance costs, recording costs and fees of Landmark's counsel, all of which costs and expenses are included in the Post-Petition Loans.

31. Notwithstanding anything herein contained to the contrary, this Order shall be without prejudice to Landmark's rights under 11 U.S.C. §§506 and 507 should the adequate protection provided by Debtor hereunder subsequently be found by this Court to have been inadequate.

32. The Debtor does hereby remise, release, acquit and forever discharge Landmark, and all of its officers, directors, agents, employees, affiliates, subsidiaries, successors and assigns, and anyone claiming through or under them or any of them, of and from all manner of action, causes of action, claims and demands of every kind and nature whatsoever,

whether known or unknown, from the beginning of time to the date of these presents, that the Debtor had or may now have against Landmark as may have arisen, or may arise, in connection with any and all matters, including, but not limited to, all matters that were or could have been set forth in connection with the loan relationship between Hen House Interstate, Inc., and Landmark.

33. No expense of administration of Debtor's Chapter 11 case or any future proceeding which may develop out of such case, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against Landmark or the Collateral, whether pursuant to §506(c) of the Bankruptcy Code or otherwise, without the prior written consent of Landmark, and no such consent shall ever be implied from any other action, inaction or acquiescence by Landmark.

34. In the event Debtor fails to make any payment due under this Order or under the Post-Petition Loan Agreement, Landmark may provide written notice of said non-payment by telecopy, certified mail or hand-delivery to Debtor's counsel. If said payment is not made within two business days after said notice is so provided, the 11 U.S.C. §362(a) automatic stay shall be deemed terminated automatically without further Order of this Court and Landmark shall have all of the rights and remedies otherwise granted to it in this Order and under the Loan Documents and the Post-Petition Loan Agreement and applicable state law, including, without limitation, the rights of set-off, peaceable repossession, foreclosure and contacting Debtor's account debtors to collect receivables. In the event Debtor fails to comply with

the terms hereof, other than any payment terms contained in this Order and in the Post-Petition Loan Agreement, Landmark may so advise counsel for Debtor by telecopy, certified mail or hand-delivery and, if the default is not cured within two business days of said notice, may apply to the Court for a hearing thereon at the earliest practical time and date. In the proceedings on any such application, Debtor shall have the burden of proving that Debtor is in full compliance with the terms of this Order and the Post-Petition Loan Agreement. A ruling by the Court that Debtor has failed to meet its burden of proof on that issue shall result in an immediate termination of the 11 U.S.C. §362(a) automatic stay with respect to Landmark and the Collateral. No party in interest shall have the right to contest the enforcement of this paragraph based on any assertion that Landmark's interests in the Collateral are adequately protected or on any other ground except the non-existence of an alleged default as set forth above, and no party in interest shall have the right to seek injunctive relief under §105 of the Bankruptcy Code inconsistent with the terms of this paragraph. Until all obligations of the Debtor to Landmark shall have been indefeasibly satisfied in full: (i) No party-in-interest other than Landmark shall foreclose or otherwise seek to enforce any lien, junior lien or other rights such other party may have in and to any property of the estate of Debtor upon which Landmark holds or asserts a lien or security interest; and (ii) upon and after the occurrence of any failure by Debtor to comply with any provision of this Order, Landmark, in its sole discretion, in connection with a liquidation of any Collateral may use any real property, equipment, trademarks, trade names, patents or any other assets of Debtor that are owned by or subject to a lien of any third party and that are

used by Debtor in its business, without the payment of fees or rentals by Landmark to such third parties.

35. Landmark shall be entitled to the full protection of 11 U.S.C. §364(e) with respect to the debts, obligations, liens and security interests created or authorized in this Order in the event that this Order or any authorization contained herein is vacated, reversed or modified on appeal or otherwise by any court of competent jurisdiction.

36. There shall not at any time be entered in Debtor's Chapter 11 case or any subsequent Chapter 7 case any further order which authorizes: (i) the use of Cash Collateral by Debtor or the sale, lease or other disposition of property of the estate of the Debtor in which Landmark has an interest; or (ii) under 11 U.S.C. §364, the obtaining of credit or the incurring of indebtedness secured by a lien or security interest that is equal or senior to a lien or security interest held by Landmark, or that is entitled to priority administrative status which is equal or superior to that granted to Landmark herein, unless, in each instance: (a) Landmark shall have given its prior written consent thereto, provided that no such consent shall ever be implied from any other action, inaction or acquiescence by Landmark; and (b) such order of this Court requires that there shall first be indefeasibly paid in full to Landmark all obligations of Debtor to Landmark.

37. The security interests and liens granted to Landmark hereunder or otherwise, the obligations of the Debtor to Landmark and the Collateral shall not be altered, modified, extended, discharged, impaired or affected by any plan of reorganization, except upon the prior written consent of Landmark.

38. The Debtor is hereby prohibited from seeking an injunction pursuant to 11 U.S.C. §105, or otherwise, to limit or delay Landmark from realizing upon the Collateral.

39. In determining to make advances to the Debtor under the Post-Petition Loan Agreement or to collect such indebtedness and obligations, Landmark shall not be deemed to be in control of the operations of the Debtor or to be acting as a "responsible person" or an "owner or operator" with respect to the operation or management of the Debtor (as such terms, or any similar terms, are used in the United States Comprehensive Environmental Response, Compensation and Liability Act, as amended, the Internal Revenue Code, as amended, or any other Federal or state statute).

40. Debtor shall serve a copy of this Order on all parties listed on its List of Twenty Largest Creditors by first-class mail, postage prepaid within three days following the entry hereof. In accordance with Bankruptcy Rules 4001(c) and (d), any creditor or party in interest who objects to the continued effect of this Order shall have until 4:30 p.m. on September __, 1991, within which to file such objection in writing with this Court and simultaneously serve such objection on the following:

David A. Warfield, Esq.
Husch & Eppenberger
100 North Broadway
St. Louis, Missouri 63102
Telephone: (314) 421-4800
Telecopy: (314) 421-0239

Carl J. Spector, Esq.
Bryan, Cave, McPheeters
& McRoberts
500 N. Broadway, Ste. 2000
St. Louis, Missouri 63102
Telephone: (314) 231-8600
Telecopy: (314) 231-5817

41. In the event such an objection is timely filed, this Order shall be treated as a preliminary Order pursuant to Bankruptcy Rules 4001(c) and (d) and may be affirmed, modified or vacated following a final hearing on the Debtor's Motion and the Landmark Motion, which final hearing shall be held on September 25, 1991, at 9:30 a.m. pursuant to Bankruptcy Rule 4001, provided, however, that the post-petition loans, advances, and credits, and the liens securing the same, shall not be affected by any such objection. If by 4:30 p.m. on September 23, 1991, no such objection has been filed, this Order shall be automatically deemed to have been entered pursuant to a final hearing on the Debtor's Motion and the Landmark Motion, in accordance with Bankruptcy Rule 4001, at which time this Order shall be deemed a final Order. If, however, any such objection is filed, this Order nevertheless shall remain in full force and effect pending the entry of an order pursuant to a final hearing. If (i) a final Order approving in all respects the terms of this Order is not entered within 20 days from the date hereof, or (ii) an order is entered at any time that terminates or modifies in any way the provisions of this Order, then Landmark shall have no further obligations to the Debtor whatsoever and the Indebtedness, the Post-Petition Loans and all other obligations of the Debtor to Landmark immediately shall be due and payable.

42. The rights and liens granted and adjudications made herein as to Landmark, and the obligations and duties of the Debtor herein, shall be binding and valid against the Debtor, all creditors and parties-in-interest in this proceeding and any successor(s) of Debtor, including any Chapter 7 trustee appointed in the present or any subsequent proceedings under

the Bankruptcy Code and shall survive the termination, modification or expiration of this Order, or any termination of the present proceedings, whether by confirmation of a plan, dismissal, conversion or otherwise. Landmark shall not be required to take any further actions or make any filings to perfect said rights and liens. If, however, Landmark shall, in its sole discretion, elect for any reason to file any financing statements, mortgages, deeds of trust or other documents with respect to such security interests and liens, the Debtor promptly shall execute same upon Landmark's request and all such financing statements, mortgages, deeds of trust and other documents shall be deemed to have been filed or recorded at the time and on the date of commencement of this Chapter 11 case. Landmark may, in its sole discretion, file a certified copy of this Order in any filing or recording office in any county or other jurisdiction in which the Debtor has real or personal property and, in such event, the subject filing or recording officer is authorized and directed to file or record such certified copy of this Order.

43. This Order may be extended from time to time without further hearing, upon written agreement of Debtor and Landmark and upon notice to the Court and to those parties as the Court may designate from time to time.

DATED: September __, 1991

_____

UNITED STATES BANKRUPTCY JUDGE

APPROVED AS TO FORM AND SUBSTANCE:

HEN HOUSE INTERSTATE, INC.
Debtor and
Debtor-in-Possession

By /s/ David A. Warfield
David A. Warfield
Husch & Eppenberger
100 North Broadway
St. Louis, Missouri 63102
(314) 421-4800

Its Attorneys

LANDMARK BANK OF ILLINOIS

By /s/ Carl J. Spector
Carl J. Spector
Karen W. Fries
Bryan, Cave, McPheeters & McRoberts
500 N. Broadway,
Suite 2000
St. Louis, Missouri 63102
(314) 231-8600

Its Attorneys

[EXHIBIT I IS REPRODUCED AT 175a-177a.]

[EXHIBIT J IS REPRODUCED AT 173a-174a.]

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Proceedings Under
Chapter 11
Case No. 91-45623-293

In Re:

HEN HOUSE INTERSTATE, INC.

Debtor.

NOTICE OF FINAL HEARING ON DEBTOR'S EMERGENCY ORDER AUTHORIZING DEBTOR TO OBTAIN POST-PETITION SECURED CREDIT, GRANTING SENIOR LIENS AND ADMINISTRATIVE PRIORITY EXPENSE, MODIFYING AUTOMATIC STAY, PROVIDING ADEQUATE PROTECTION AND AUTHORIZING AGREEMENTS WITH LANDMARK BANK OF ILLINOIS AND ON EMERGENCY MOTION FOR RELIEF FROM AUTOMATIC STAY, OR IN THE ALTERNATIVE, FOR ADEQUATE PROTECTION, AND FOR ORDER DENYING USE OF CASH COLLATERAL AND REQUIRING SEGREGATION AND ACCOUNTING OF CASH COLLATERAL FILED BY LANDMARK BANK OF ILLINOIS

Emergency Motion to Obtain Post-Petition Financing

TO: INDIVIDUALS AND ENTITIES PER NOTICE LIST ATTACHED HERETO

PLEASE TAKE NOTICE that on September 6, 1991, the following motions were filed with the Court; Debtor's *Emergency Motion for Order Authorizing Debtor to Obtain Post-Petition Financing Pursuant to 11 U.S.C. § 364, to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363, and Granting Adequate Protection to Pre-Petition Secured Party* (the "Debtor's Motion") and *Emergency Motion for Relief From Automatic Stay or, in the Alternative, for Adequate Protection, and for Order Denying Use of Cash Collateral and Requiring Segregation and Accounting of Cash Collateral* filed by Landmark Bank of Illinois ("Landmark's Motion"). Pursuant to those motions, the Court entered an Emergency Order on September 6, 1991, a copy of which is being served on you simultaneously herewith, together with a copy of the Debtor's Motion. In accordance with bankruptcy Rule 4001, any creditor or party in interest who objects to the Order becoming final shall have until 4:30 p.m. on September 23, 1991, within which to file such objection in writing with this Court and simultaneously serve such objection on the following:

David A. Warfield, Esq.
Husch & Eppenberger
100 North Broadway, #1300
St. Louis, MO 63102
Phone: (314) 421-4800
Fax: (314) 421-0239

Carl J. Spector, Esq.
Bryan, Cave, McPheeters & McRoberts
500 N. Broadway, #2000
St. Louis, MO 63102
Phone: (314) 231-8600
Fax: (314) 231-5817

Emergency Motion to Obtain Post-Petition Financing

In the event such an objection is timely filed, the Order shall be treated as a preliminary Order pursuant to Bankruptcy Rule 4001 and may be affirmed, modified or vacated following a final hearing on the Debtor's Motion and Landmark's Motion, which final hearing shall be held in the courtroom of the Honorable David P. McDonald, Bankruptcy Judge, at the United States Courthouse Building, 1114 Market Street, 7th Floor, St. Louis, Missouri, on September 25, 1991, at 9:30 a.m. pursuant to Bankruptcy Rule 4001, provided, however, that the post-petition loans, advances and credits, and the liens securing the same, authorized by the Emergency Order shall not be affected by any such objection. If by 4:30 p.m. on September 23, 1991, no such objection has been filed, this Order shall be automatically deemed to have been entered pursuant to a final hearing on the Debtor's Motion and Landmark's Motion, in accordance with Bankruptcy Rule 4001, at which time this Order shall be deemed a final Order. If, however, any such objection is filed, the Emergency Order nevertheless shall remain in full force and effect pending the entry of an order pursuant to a final hearing. If an order is entered that terminates or modifies in any way the provisions of the Emergency Order, then Landmark shall have no further obligations to the Debtor whatsoever and all obligations of the Debtor to Landmark immediately shall be due and payable.

Emergency Motion to Obtain Post-Petition Financing

Dated: September 7, 1991.

HEN HOUSE INTERSTATE, INC.
Debtor and Debtor-in-Possession

s/ David A. Warfield
David A. Warfield
Susan M. Spraul
100 North Broadway, Suite 1300
St. Louis, Missouri 63102
(314) 421-4800

EMERGENCY ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION AUTHORIZING DEBTOR TO OBTAIN POST-PETITION SECURED CREDIT, GRANTING SENIOR LIENS AND ADMINISTRATIVE PRIORITY EXPENSE, MODIFYING AUTOMATIC STAY, PROVIDING ADEQUATE PROTECTION AND AUTHORIZING AGREEMENTS WITH LANDMARK BANK OF ILLINOIS DATED SEPTEMBER 6, 1991

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Proceedings Under Chapter 11

Case No. 91-45623-293

Motion E

In Re:

HEN HOUSE INTERSTATE, INC.,

Debtor.

EMERGENCY ORDER AUTHORIZING DEBTOR TO OBTAIN POST-PETITION SECURED CREDIT, GRANTING SENIOR LIENS AND ADMINISTRATIVE PRIORITY EXPENSE, MODIFYING AUTOMATIC STAY, PROVIDING ADEQUATE PROTECTION AND AUTHORIZING AGREEMENTS WITH LANDMARK BANK OF ILLINOIS

This matter is before the Court on Debtor's *Emergency Motion For Order Authorizing Debtor to Obtain Post-Petition Financing Pursuant to 11 U.S.C. §364, to Utilize Cash Collateral Pursuant to 11 U.S.C. §363, and Granting Adequate Protection to Pre-Petition Secured Party* (the "Debtor's Motion") filed by the above Debtor and on the *Emergency Motion for Relief From Automatic Stay or, in the Alternative for Adequate Protection, and for Order Denying Use of Cash Collateral and Requiring Segregation and Accounting of Cash Collateral* (the "Landmark Motion") filed by Landmark Bank of Illinois ("Landmark"), Debtor and Landmark having agreed to the entry of this Order, the relief granted hereby and the terms and conditions herein set forth, and on the basis of representations made and testimony received from the Debtor, and upon the record in these Chapter 11 proceedings, the Court finds and determines that it is in the best interests of Debtor's estate and its creditors and that there is good cause to grant the emergency relief requested in the Debtor's Motion and the Landmark Motion herein provided. The Court finds that the Debtor does not otherwise have funds available to meet payroll and other necessary expenses, that the Debtor is unable to obtain credit other than on the basis provided herein, that the ability of the Debtor to continue its business, remain a viable entity and have an opportunity to reorganize under Chapter 11 of the Bankruptcy Code depends on obtaining post-petition secured financing from Landmark on the terms provided herein, and that absent the relief provided herein, Debtor's estate would suffer immediate and irreparable harm. The Court finds that the notice hereof having been provided is, under the circumstances, adequate and sufficient and complies with the requirements of 11 U.S.C. §§102(1) and

361 through 364 and Bankruptcy Rule 4001, and any notice periods in excess hereof are hereby shortened to conform to the notices given herein. The Court further finds that Debtor and Landmark have acted in good faith (as used in §364(e) of the Bankruptcy Code) with respect to the extension of credit authorized pursuant to this Order and all other aspects of this Order, and that the relief requested and the terms and conditions set forth herein are in the best interests of Debtor's estate and its creditors.

ACCORDINGLY, IT IS, HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334, as this matter arises in the Chapter 11 case of Debtor. No trustee has been appointed and Debtor has remained in possession of its estate.

2. Landmark is the holder of a certain revolving line of credit note, executed and delivered by the Debtor as of June 2, 1987 in consideration of a loan by Landmark to the Debtor, wherein the Debtor promised to pay to Landmark the principal sum of $350,000.00 with interest thereon, as more fully set forth therein (the "Revolving Note"). A true and correct copy of the Revolving Note has been filed by Landmark under separate cover as Exhibit 1 to the Landmark Motion and is incorporated herein by reference.

3. Landmark is the holder of a certain term promissory note, executed and delivered by the Debtor as of June 2, 1987 in consideration of a loan by Landmark to the Debtor, wherein the Debtor promised to pay to Landmark the

principal sum of $4,460,000.00 with interest thereon, as more fully set forth therein (the "Term Note"). A true and correct copy of the Term Note has been filed by Landmark under separate cover as Exhibit 2 to the Landmark Motion and is incorporated herein by reference.

4. Landmark is the holder of a certain promissory note, executed and delivered by the Debtor as of March 31, 1991 in consideration of a loan by Landmark to the Debtor, wherein the Debtor promised to pay to Landmark the principal sum of $53,000.00 with interest thereon as more fully set forth therein (the "Promissory Note"). A true and correct copy of the Promissory Note has been filed by Landmark under separate cover as Exhibit 3 to the Landmark Motion and is incorporated herein by reference.

5. The Revolving Note and Term Note were amended pursuant to a First Amendment to Promissory Notes ("First Amendment to Notes") dated December 28, 1990. A true and correct copy of the First Amendment to Notes is filed contemporaneously herewith under separate cover as Exhibit 4 and incorporated herein by reference. The Revolving Note, Term Note, First Amendment to Notes and Promissory Note are hereinafter collectively referred to as the "Notes").

6. In connection with the execution of the Notes, the Debtor and Landmark entered into a loan agreement executed May 15, 1987 (the "Original Loan Agreement"). A true and correct copy of the original Loan Agreement has been filed by Landmark under separate cover as Exhibit 5 to the Landmark Motion and is incorporated herein by reference.

7. The Loan Agreement was amended pursuant to a First Amendment to Loan Agreement ("Loan Agreement Amendment #1") dated December 28, 1990. A true and correct copy of the Loan Agreement Amendment #1 has been filed by Landmark under separate cover as Exhibit 6 to the Landmark Motion and is incorporated herein by reference.

8. The Loan Agreement was again amended pursuant to a Second Amendment to Loan Agreement ("Loan Agreement Amendment #2") dated March 31, 1991. A true and correct copy of the Loan Agreement Amendment #2 is filed contemporaneously herewith under separate cover as Exhibit 7 and incorporated herein by reference. The original Loan Agreement, Loan Agreement Amendment #1 and Loan Agreement Amendment #2 are hereinafter collectively referred to as the "Loan Agreement."

9. The Debtor executed and delivered to Landmark the following documents in order to secure the repayment of all obligations of Debtor to Landmark:

a. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 1524, Page 727 in the records of the Recorder's Office of the County of Champaign, State of Illinois (the "Champaign County Mortgage"), which encumbers certain premises in the County of Champaign, State of Illinois, described more fully therein (the "Champaign County Premises"). A true and correct copy of the Champaign County Mortgage has been filed by Landmark under separate cover as Exhibit 8 to the Landmark Motion and is incorporated herein by reference.

b. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 148, Page 320 in the records of the Recorder's Office of the County of DeWitt, State of Illinois (the "DeWitt County Mortgage"), which encumbers certain premises in the County of DeWitt, State of Illinois, described more fully therein (the "DeWitt County Premises"). A true and correct copy of the DeWitt County Mortgage has been filed by Landmark under separate cover as Exhibit 9 to the Landmark Motion and is incorporated herein by reference.

c. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number 180011 in the records of the Recorder's Office of the County of Ford, State of Illinois (the "Ford County Mortgage"), which encumbers certain premises in the County of Ford, State of Illinois, described more fully therein (the "Ford County Premises"). A true and correct copy of the Ford County Mortgage has been filed by Landmark under separate cover as Exhibit 10 to the Landmark Motion and is incorporated herein by reference.

d. Deed of Trust given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number I775025 at I1683P2261 et. seq. in the records of the Recorder's Office of the County of Jackson, State of Missouri (the "Jackson County Deed"), which encumbers certain premises in the County of Jackson, State of Missouri, described more fully therein (the "Jackson County Premises"). A true and correct copy of

the Jackson County Deed has been filed by Landmark under separate cover as Exhibit 11 to the Landmark Motion and is incorporated herein by reference.

e. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 173, Page 518 in the records of the Recorder's Office of the County of Laurel, State of Kentucky (the "Laurel County Mortgage"), which encumbers certain premises in the County of Laurel, State of Kentucky, described more fully therein (the "Laurel County Premises"). A true and correct copy of the Laurel County Mortgage has been filed by Landmark under separate cover as Exhibit 12 to the Landmark Motion and is incorporated herein by reference.

f. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 3423, Page 1266 in the records of the Recorder's Office of the County of Madison, State of Illinois (the "Madison County Mortgage"), which encumbers certain premises in the County of Madison, State of Illinois, described more fully therein (the "Madison County Premises"). A true and correct copy of the Madison County Mortgage has been filed by Landmark under separate cover as Exhibit 13 to the Landmark Motion and is incorporated herein by reference.

g. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 399, Page 485 in the records of the Recorder's Office of the County of Marion, State of Illinois (the "Marion County

Mortgage"), which encumbers certain premises in the County of Marion, State of Illinois, described more fully therein (the "Marion County Premises"). A true and correct copy of the Marion County Mortgage is filed contemporaneously herewith under separate cover as Exhibit 14 and incorporated herein by reference.

h. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number 87-10253 in the records of the Recorder's Office of the County of McLean, State of Illinois (the "McLean County Mortgage"), which encumbers certain premises in the County of McLean, State of Illinois, described more fully therein (the "McLean County Premises"). A true and correct copy of the McLean County Mortgage has been filed by Landmark under separate cover as Exhibit 15 to the Landmark Motion and is incorporated herein by reference.

i. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 374, Page 247 in the records of the Recorder's Office of the County of Morgan, State of Indiana (the "Morgan County Mortgage"), which encumbers certain premises in the County of Morgan, State of Indiana, described more fully therein (the "Morgan County Premises"). A true and correct copy of the Morgan County Mortgage has been filed by Landmark under separate cover as Exhibit 16 to the Landmark Motion and is incorporated herein by reference.

j. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 1987, Page 7516 in the records of the Recorder's Office of the County of Delaware, State of Indiana (the "Delaware County Mortgage"), which encumbers certain premises in the County of Delaware, State of Indiana, described more fully therein (the "Delaware County Premises"). A true and correct copy of the Delaware County Mortgage has been filed by Landmark under separate cover as Exhibit 17 to the Landmark Motion and is incorporated herein by reference.

k. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 2676, Page 1130 in the records of the Recorder's Office of the County of St. Clair, State of Illinois (the "St. Clair County Mortgage"), which encumbers certain premises in the County of St. Clair, State of Illinois, described more fully therein (the "St. Clair County Premises"). A true and correct copy of the St. Clair County Mortgage has been filed by Landmark under separate cover as Exhibit 18 to the Landmark Motion and is incorporated herein by reference.

l. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number 167252 in Book 367, Page 345 in the records of the Recorder's Office of the County of Washington, State of Illinois (the "Washington County Mortgage"), which encumbers certain premises in the County of Washington, State of Illinois, described more fully therein (the "Washington County Premises"). A true and

correct copy of the Washington County Mortgage has been filed by Landmark under separate cover as Exhibit 19 to the Landmark Motion and is incorporated herein by reference.

m. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number R87-28965 in the records of the Recorder's Office of the County of Will, State of Illinois (the "Will County Mortgage"), which encumbers certain premises in the County of Will, State of Illinois, described more fully therein (the "Will County Premises"). A true and correct copy of the Will County Mortgage has been filed by Landmark under separate cover as Exhibit 20 to the Landmark Motion and is incorporated herein by reference.

n. Collateral Pledge Agreement by the Debtor to Landmark dated May 15, 1987 (the "Collateral Pledge") wherein Debtor pledged to Landmark a certificate of deposit and other items as more fully described therein. A true and correct copy of the Collateral Pledge has been filed by Landmark under separate cover as Exhibit 21 to the Landmark Motion and is incorporated herein by reference.

o. Security Agreement-Equipment by the Debtor to Landmark dated May 15, 1987 (the "Equipment Security Agreement") wherein the Debtor granted to Landmark a security interest in furniture, fixtures, equipment, and machinery of every kind and nature, as more fully set forth in the Equipment Security Agreement. A true and

correct copy of the Equipment Security Agreement has been filed by Landmark under separate cover as Exhibit 22 to the Landmark Motion and is incorporated herein by reference.

p. Security Agreement (Inventory-Accounts Receivable) by the Debtor to Landmark dated May 15, 1987 (the "Inventory Security Agreement") wherein the Debtor granted to Landmark a security interest in the Debtor's inventory and accounts receivable as more fully set forth in the Inventory Security Agreement. A true and correct copy of the Inventory Security Agreement has been filed by Landmark under separate cover as Exhibit 23 to the Landmark Motion and is incorporated herein by reference.

q. Assignment of Interest in Contracts and Leases by the Debtor to Landmark dated May 15, 1987 (the "Contracts/Leases Assignment") wherein the Debtor assigned to Landmark all of the Debtor's right, title and interest in and to all contracts, permits, licenses, easements and leases, as more fully described therein. A true and correct copy of the Contracts/Leases Assignment has been filed by Landmark under separate cover as Exhibit 24 to the Landmark Motion and is incorporated herein by reference.

r. Assignment of Contract Rights by the Debtor to Landmark dated May 15, 1987 (the "Contract Rights Assignment") wherein the Debtor granted to Landmark a security interest in all of the Debtor's rights under a Management Services Agreement between the Debtor

and Omni Outdoor Advertising, Inc. as more fully described therein. A true and correct copy of the Contract Rights Assignment has been filed by Landmark under separate cover as Exhibit 25 to the Landmark Motion and is incorporated herein by reference.

10. The Champaign County Mortgage, DeWitt County Mortgage, Ford County Mortgage, Jackson County Deed, Laurel County Mortgage, Madison County Mortgage, Marion County Mortgage, McLean County Mortgage, Morgan County Mortgage, Delaware County Mortgage, St. Clair County Mortgage, Washington County Mortgage, Will County Mortgage, Collateral Pledge, Equipment Security Agreement, Inventory Security Agreement, Contracts/Lease Assignment and Contract Rights Assignment are hereinafter collectively referred to as the "Collateral Documents." The Notes, the Loan Agreement and the Collateral Documents are hereinafter sometimes collectively referred to as the "Loan Documents."

11. Perfection of Landmark's security interests granted in the Collateral Documents, was effectuated *inter alia* by the filing of Uniform Commercial Code Financing Statements with the offices and in the indexes as noted thereon (the "Filings"). True and correct copies of the Filings has been filed by Landmark under separate cover as Exhibit 26 to the Landmark Motion and is incorporated herein by reference.

12. Pursuant to the Loan Documents, Debtor promised to pay all costs of collection of Landmark incurred in connection therewith, including, without limitation, reasonable costs, fees, attorneys' fees and expenses.

13. Debtor is in default of its obligations to Landmark under the Loan Documents.

14. As of the date Debtor filed its petition herein (the "Filing Date"), Debtor was indebted to Landmark in the aggregate amount of $4,139,676.57, plus accruing interest,[1] costs, expenses and fees of collection (the "Indebtedness"). The validity and priority of the Indebtedness and the liens and security interests securing the Indebtedness are not subject to any setoff, recoupment, counterclaim, avoidance or other challenge or attack of any kind or nature. The Indebtedness is hereby allowed as a secured claim.

15. All of Debtor's cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents, proceeds, products, rents, or profits derived from Debtor's business or any other property subject to Landmark's security interests, whether existing before or after the Filing Date, constitute "cash collateral" pursuant to 11 U.S.C. §363 and is subject to the duly perfected liens of Landmark (the "Cash Collateral").

16. Substantially all real and all personal property of Debtor, including its fixtures, accounts, Cash Collateral, inventory, machinery, equipment, real estate and personal property of any nature whatsoever (collectively the "Collateral") is encumbered by and subject to the first priority, perfected liens of Landmark pursuant to the duly executed Loan Documents as security for repayment of the Indebtedness.

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1. Interest has been calculated at the pre-default rate. This Order shall be without prejudice to Landmark's right to claim interest at the default rates specified in the Loan Documents.

17. Pursuant to 11 U.S.C. §363, Debtor is prohibited from using, selling or leasing the Collateral for any purpose unless Landmark consents or the Court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of 11 U.S.C. §363.

18. Pursuant to 11 U.S.C. §363(c)(4), Debtor is required to segregate and account for all Cash Collateral in its possession, custody or control.

19. 11 U.S.C. §363(e) requires that notwithstanding any other provision of said section, upon Landmark's request, the Court, with or without a hearing, shall prohibit or condition Debtor's use, sale, or lease of any Collateral as is necessary to provide adequate protection of Landmark's interests therein.

20. Except upon further Order of this Court or upon default hereunder, Debtor, as debtor-in-possession, may continue to operate its business and to collect the cash, rents, profits and proceeds generated therefrom, limited solely to the ordinary course of business and in accordance with the provisions of this Order and the Bankruptcy Code.

21. All cash, cash equivalents, rents, profits, proceeds and income collected by the Debtor or on the Debtor's behalf shall be deposited and maintained at all times in a debtor-in-possession bank account(s) at Landmark (the "DIP Accounts") in accordance with 11 U.S.C. §345 and shall not be commingled with any other funds derived from any source whatsoever that do not constitute "Cash Collateral" under the terms of this Order.

22. Except as expressly permitted herein, Debtor shall not use any Cash Collateral in its possession, custody or control at any time, and any cash previously or hereafter received by or on behalf of Debtor immediately shall be delivered to Landmark and used in accordance with the terms of the Post-Petition Loan Agreement (the "Post-Petition Loan Agreement") attached as Exhibit A to the Debtor's Motion and in accordance with the terms of this Order.

23. Debtor is hereby authorized pursuant to 11 U.S.C. §364 to enter into and execute the Post-Petition Loan Agreement, and all documents required thereby or in connection therewith, and borrow funds from Landmark pursuant thereto and pursuant to this Order. The Debtor is hereby immediately authorized to borrow pursuant to the Post-Petition Loan Agreement up to the amount of $50,000, which authorization is without prejudice to the Debtor's request for authorization at the final hearing on this matter to borrow up to the balance of the financing available under the Post-Petition Loan Agreement. The indebtedness incurred under the Post-Petition Loan Agreement shall be secured and collateralized as provided herein. All amounts advanced under the Post-Petition Loan Agreement shall constitute post-petition loans (the "Post-Petition Loans") by Landmark to, and debts of, Debtor bearing interest at the rate provided therein. All obligations described herein, including the Indebtedness and the Post-Petition Loans, are hereby ordered and adjudicated to be binding and enforceable obligations of the Debtor. The Post-Petition Loans shall mature and become immediately due and payable upon the earliest of (i) default hereunder, (ii) default under the Post-Petition Loan Agreement or (iii) the maturity date specified in the Post-

Petition Loan Agreement (or any extended maturity date that may be agreed to in writing by Landmark), at which time the Indebtedness, the Post-Petition Loans and all other obligations of the Debtor to Landmark shall be immediately due and payable. Landmark's obligation to make advances pursuant to the Post-Petition Loan Agreement shall at all times be entirely discretionary on Landmark's part, and in any event shall terminate upon Debtor's default hereunder or upon maturity of the Post-Petition Loans unless the maturity of the Post-Petition Loans is extended, or the Post-Petition Loans are renewed, as hereinafter provided. Landmark may, in its sole discretion, elect to extend the maturity of the Post-Petition Loans, but Landmark shall have no obligation whatsoever to so extend.

24. Subject to the terms hereof and Debtor's compliance herewith, Debtor is hereby authorized to use the Cash Collateral and the proceeds of the Post-Petition Loans for the amounts set forth in the budget attached hereto and incorporated herein by reference as Attachment 1 (the "Budget") for use solely for the payment of the expenses to the extent set forth in the Budget. Notwithstanding the foregoing, except for the $100,000 retainer of the Debtor's attorneys ($20,000 of which shall be deposited with the Debtor's attorneys upon entry of this Order and the remaining $80,000 of which shall be deposited with the Debtor's attorneys upon entry of a final order approving in all respects the terms of this Order), the expenses designated in the Budget shall be limited to post-Filing Date expenses incurred in the ordinary course of Debtor's business, except as expressly authorized by separate Orders of this Court. Except as specifically authorized herein or by separate Orders of

this Court, no transactions with, funds or payments to, or commitments to pay, any insider (except normal, reasonable salaries), affiliate or related entity of, or controlled (directly or indirectly) by Debtor, shall be made, paid or disbursed by Debtor to any such insider, affiliate or related entity.

25. Debtor shall pay or cause to be paid all ordinary and necessary expenses of operation of its business and the costs required to care for, preserve and maintain the Collateral, which are allowed in the Budget, including, but not limited to, the following:

a. Utility costs and telephone charges;

b. Reasonable salaries to employees of Debtor;

c. Upkeep, maintenance and repairs;

d. Insurance so as to assure continued coverage of the Collateral in accordance with the Loan Documents;

e. Purchase or rental of necessary supplies and equipment;

f. Income, withholding, sales, use, real estate and other taxes, operating permit fees and other charges necessarily incurred in the ordinary course of the Debtor's business.

26. In order to protect Landmark against a decline in the value of its secured position in the Collateral, and to afford such other adequate protection as is required under the Bankruptcy Code:

a. The Debtor shall operate its business pursuant to the terms herein set forth and shall perform all of the obligations hereunder.

b. Landmark is hereby granted, to the extent not heretofore granted, a first, priority and perfected senior lien and security interest in all presently owned and hereafter acquired real and personal property, assets and rights of any kind and nature of Debtor, including all proceeds thereof, wherever located, to secure the Indebtedness, the Post-Petition Loans and all other obligations of the Debtor to Landmark, including interest, fees and expenses thereon. In accordance with 11 U.S.C. §507(b), to the extent the value of Landmark's security interests in the Collateral declines after entry of this Order notwithstanding the adequate protection herein set forth, or such adequate protection otherwise proves to be inadequate, said liens and security interests shall have priority over all administration expenses of any kind as provided in 11 U.S.C. §364(c)(1), and, pursuant to 11 U.S.C. §364(c), shall be first and prior liens on the aforesaid property, assets and rights of Debtor. Proceeds from the liquidation of any Collateral shall be applied to the Indebtedness and the Post-Petition Loans in such manner and order as Landmark, in its sole discretion, shall elect.

c. Except as specifically modified herein with respect to payment, or under applicable provisions of the Bankruptcy Code, Debtor shall comply with all terms and provisions of the Loan Documents. Landmark's waiver of the breach of any covenant set forth in the

Loan Documents shall not be deemed a waiver of any subsequent defaults or remedies to which Landmark may be entitled.

d. Landmark is hereby granted the right and is authorized to enter upon, occupy and use any or all of the premises of the Debtor as is reasonable upon prior notice to the Debtor, as Landmark may deem necessary or appropriate, in Landmark's sole discretion, in connection with the exercise of any of Landmark's rights and remedies under the Loan Documents and/or the Post-Petition Loan Agreement, including, without limitation, liquidation of the Collateral.

e. Debtor immediately and continuously shall use its best efforts to market for sale as a going concern the outdoor billboard advertising business of the Debtor, and the proceeds from any such sale immediately shall be paid to Landmark at the closing of such sale for application toward reduction of the Indebtedness.

f. Proceeds from all non-ordinary course of business sales of assets of the Debtor immediately shall be paid to Landmark at the closing(s) of such sales for application toward reduction of the Indebtedness.

g. The automatic stay of 11 U.S.C. §362(a) is hereby modified to the extent necessary to permit Landmark to receive all proceeds from asset sales of the Debtor and apply the same toward reduction of the Indebtedness. Furthermore, the automatic stay is hereby vacated in all respects as to Landmark for the enforcement of

Landmark's rights with respect to the creation, perfection and implementation of Landmark's pre-petition and post-petition liens and security interests in the Collateral.

h. At such time as Landmark is entitled to exercise any remedy with respect to one or more items of Collateral, whether as a result of a default by Debtor or otherwise, the Debtor (or a trustee if one shall have been appointed) shall, at Landmark's request (A) immediately arrange, and diligently pursue to conclusion, a sale or sales, pursuant to 11 U.S.C. §363 free and clear of all liens, claims, encumbrances and interests, of such Collateral designated by Landmark, with Landmark to retain its right to credit bid all or any portion of the Debtor's obligations to Landmark, or (B) immediately transfer (by deed in lieu of foreclosure or other similar conveyance) to Landmark such Collateral designated by Landmark for a credit bid in an amount to be approved by the Court as fair and reasonable.

27. Subject to the terms hereof, Debtor shall sell or dispose of its inventory, products and supplies and shall operate its business only in the ordinary course of business in compliance with the provisions of the Bankruptcy Code and upon the terms and conditions usual and customary in such business, and shall deposit the proceeds of such operations only in the DIP Accounts.

28. Landmark's authorized representatives shall be given continuous reasonable access at all times to any and all operating personnel, books, records, information and documents of Debtor relating to the operation of Debtor's business and Debtor's financial dealings.

29. Debtor shall furnish or otherwise cause to be furnished to Landmark all such documents and reports as are required by the Loan Documents and the Post-Petition Loan Agreement at such times and in such a manner as are required by the Loan Documents and the Post-Petition Loan Agreement. In addition, the Debtor shall provide Landmark with copies of all schedules and statements of affairs, operating reports, and other financial information, if any, at any time filed in these proceedings by the Debtor.

30. Debtor is authorized and directed to reimburse Landmark promptly for all present and future costs and expenses incurred by Landmark to effectuate the financing transactions as provided in the Loan Documents, the Post-Petition Loan Agreement and/or this Order, including, but not limited to, audit expenses, field examination expenses, title insurance costs, recording costs and fees of Landmark's counsel, all of which costs and expenses are included in the Post-Petition Loans.

31. Notwithstanding anything herein contained to the contrary, this Order shall be without prejudice to Landmark's rights under 11 U.S.C. §§506 and 507 should the adequate protection provided by Debtor hereunder subsequently be found by this Court to have been inadequate.

32. The Debtor does hereby remise, release, acquit and forever discharge Landmark, and all of its officers, directors, agents, employees, affiliates, subsidiaries, successors and assigns, and anyone claiming through or under them or any of them, of and from all manner of action, causes of action, claims and demands of every kind and nature whatsoever,

whether known or unknown, from the beginning of time to the date of these presents, that the Debtor had or may now have against Landmark as may have arisen, or may arise, in connection with any and all matters, including, but not limited to, all matters that were or could have been set forth in connection with the loan relationship between Hen House Interstate, Inc., and Landmark.

33. No expense of administration of Debtor's Chapter 11 case or any future proceeding which may develop out of such case, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against Landmark or the Collateral, whether pursuant to §506(c) of the Bankruptcy Code or otherwise, without the prior written consent of Landmark, and no such consent shall ever be implied from any other action, inaction or acquiescence by Landmark.

34. In the event Debtor fails to make any payment due under this Order or under the Post-Petition Loan Agreement, Landmark may provide written notice of said non-payment by telecopy, certified mail or hand-delivery to Debtor's counsel. If said payment is not made within two business days after said notice is so provided, the 11 U.S.C. §362(a) automatic stay shall be deemed terminated automatically without further Order of this Court and Landmark shall have all of the rights and remedies otherwise granted to it in this Order and under the Loan Documents and the Post-Petition Loan Agreement and applicable state law, including, without limitation, the rights of set-off, peaceable repossession, foreclosure and contacting Debtor's account debtors to collect receivables. In the event Debtor fails to comply with

the terms hereof, other than any payment terms contained in this Order and in the Post-Petition Loan Agreement, Landmark may so advise counsel for Debtor by telecopy, certified mail or hand-delivery and, if the default is not cured within two business days of said notice, may apply to the Court for a hearing thereon at the earliest practical time and date. In the proceedings on any such application, Debtor shall have the burden of proving that Debtor is in full compliance with the terms of this Order and the Post-Petition Loan Agreement. A ruling by the Court that Debtor has failed to meet its burden of proof on that issue shall result in an immediate termination of the 11 U.S.C. §362(a) automatic stay with respect to Landmark and the Collateral. No party in interest shall have the right to contest the enforcement of this paragraph based on any assertion that Landmark's interests in the Collateral are adequately protected or on any other ground except the non-existence of an alleged default as set forth above, and no party in interest shall have the right to seek injunctive relief under §105 of the Bankruptcy Code inconsistent with the terms of this paragraph. Until all obligations of the Debtor to Landmark shall have been indefeasibly satisfied in full: (i) No party-in-interest other than Landmark shall foreclose or otherwise seek to enforce any lien, junior lien or other rights such other party may have in and to any property of the estate of Debtor upon which Landmark holds or asserts a lien or security interest; and (ii) upon and after the occurrence of any failure by Debtor to comply with any provision of this Order, Landmark, in its sole discretion, in connection with a liquidation of any Collateral may use any real property, equipment, trademarks, trade names, patents or any other assets of Debtor that are owned by or subject to a lien of any third party and that are

used by Debtor in its business, without the payment of fees or rentals by Landmark to such third parties.

35. Landmark shall be entitled to the full protection of 11 U.S.C. §364(e) with respect to the debts, obligations, liens and security interests created or authorized in this Order in the event that this Order or any authorization contained herein is vacated, reversed or modified on appeal or otherwise by any court of competent jurisdiction.

36. There shall not at any time be entered in Debtor's Chapter 11 case or any subsequent Chapter 7 case any further order which authorizes: (i) the use of Cash Collateral by Debtor or the sale, lease or other disposition of property of the estate of the Debtor in which Landmark has an interest; or (ii) under 11 U.S.C. §364, the obtaining of credit or the incurring of indebtedness secured by a lien or security interest that is equal or senior to a lien or security interest held by Landmark, or that is entitled to priority administrative status which is equal or superior to that granted to Landmark herein, unless, in each instance: (a) Landmark shall have given its prior written consent thereto, provided that no such consent shall ever be implied from any other action, inaction or acquiescence by Landmark; and (b) such order of this Court requires that there shall first be indefeasibly paid in full to Landmark all obligations of Debtor to Landmark.

37. The security interests and liens granted to Landmark hereunder or otherwise, the obligations of the Debtor to Landmark and the Collateral shall not be altered, modified, extended, discharged, impaired or affected by any plan of reorganization, except upon the prior written consent of Landmark.

38. The Debtor is hereby prohibited from seeking an injunction pursuant to 11 U.S.C. §105, or otherwise, to limit or delay Landmark from realizing upon the Collateral.

39. In determining to make advances to the Debtor under the Post-Petition Loan Agreement or to collect such indebtedness and obligations, Landmark shall not be deemed to be in control of the operations of the Debtor or to be acting as a "responsible person" or an "owner or operator" with respect to the operation or management of the Debtor (as such terms, or any similar terms, are used in the United States Comprehensive Environmental Response, Compensation and Liability Act, as amended, the Internal Revenue Code, as amended, or any other Federal or state statute).

40. Debtor shall serve a copy of this Order on all parties listed on its List of Twenty Largest Creditors by first-class mail, postage prepaid within three days following the entry hereof. In accordance with Bankruptcy Rules 4001(c) and (d), any creditor or party in interest who objects to the continued effect of this Order shall have until 4:30 p.m. on September 23, 1991, within which to file such objection in writing with this Court and simultaneously serve such objection on the following:

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Telephone: (314) 231-8600
Telecopy: (314) 231-5817

41. In the event such an objection is timely filed, this Order shall be treated as a preliminary Order pursuant to Bankruptcy Rules 4001(c) and (d) and may be affirmed, modified or vacated following a final hearing on the Debtor's Motion and the Landmark Motion, which final hearing shall be held on September 25, 1991, at 9:30 a.m. pursuant to Bankruptcy Rule 4001, provided, however, that the post-petition loans, advances, and credits, and the liens securing the same, shall not be affected by any such objection. If by 4:30 p.m. on September 23, 1991, no such objection has been filed, this Order shall be automatically deemed to have been entered pursuant to a final hearing on the Debtor's Motion and the Landmark Motion, in accordance with Bankruptcy Rule 4001, at which time this Order shall be deemed a final Order. If, however, any such objection is filed, this Order nevertheless shall remain in full force and effect pending the entry of an order pursuant to a final hearing. If (i) a final Order approving in all respects the terms of this Order is not entered within 20 days from the date hereof, or (ii) an order is entered at any time that terminates or modifies in any way the provisions of this Order, then Landmark shall have no further obligations to the Debtor whatsoever and the Indebtedness, the Post-Petition Loans and all other obligations of the Debtor to Landmark immediately shall be due and payable.

42. The rights and liens granted and adjudications made herein as to Landmark, and the obligations and duties of the Debtor herein, shall be binding and valid against the Debtor, all creditors and parties-in-interest in this proceeding and any successor(s) of Debtor, including any Chapter 7 trustee appointed in the present or any subsequent proceedings under

the Bankruptcy Code and shall survive the termination, modification or expiration of this Order, or any termination of the present proceedings, whether by confirmation of a plan, dismissal, conversion or otherwise. Landmark shall not be required to take any further actions or make any filings to perfect said rights and liens. If, however, Landmark shall, in its sole discretion, elect for any reason to file any financing statements, mortgages, deeds of trust or other documents with respect to such security interests and liens, the Debtor promptly shall execute same upon Landmark's request and all such financing statements, mortgages, deeds of trust and other documents shall be deemed to have been filed or recorded at the time and on the date of commencement of this Chapter 11 case. Landmark may, in its sole discretion, file a certified copy of this Order in any filing or recording office in any county or other jurisdiction in which the Debtor has real or personal property and, in such event, the subject filing or recording officer is authorized and directed to file or record such certified copy of this Order.

43. This Order may be extended from time to time without further hearing, upon written agreement of Debtor and Landmark and upon notice to the Court and to those parties as the Court may designate from time to time.

DATED: September 6, 1991

s/ David P. McDonald
UNITED STATES BANKRUPTCY
JUDGE

APPROVED AS TO FORM AND SUBSTANCE:

HEN HOUSE INTERSTATE, INC. Debtor and Debtor-in-Possession	LANDMARK BANK OF ILLINOIS
By /s/ David A. Warfield David A. Warfield Husch & Eppenberger 100 North Broadway St. Louis, Missouri 63102 (314) 421-4800 Its Attorneys	By /s/ Carl J. Spector Carl J. Spector Karen W. Fries Bryan, Cave, McPheeters & McRoberts 500 N. Broadway, Suite 2000 St. Louis, Missouri 63102 (314) 231-8600 Its Attorneys

ATTACHMENT 1

HEN HOUSE INTERSTATE
CASH FLOW

PAGE 1 OF 2

ATTACHMENT 1

NEW HOUSE INTERSTATE
CASH FLOW C:\92CF8DMM
09/03/91

	SEP FRI 6TH	SEP SAT 7TH	SEP SUN 8TH	SEP MON 9TH	SEP TUES 10TH	SEP WED 11TH	SEP THUR 12TH	SEP FRI 13TH	SEP SAT 14TH	SEP SUN 15TH	SEP MON 16TH	SEP TUES 17TH	SEP WED 18TH
PRIOR DAY BALANCE	47.021	(857)	(857)	(857)	35.520	18.216	45.366	45.066	(32.964)	(32.964)	(32,964)	(14,911)	(14,9
CASH IN:													
WIRE TRANSFER	28.500			74,000		29.000		29.000			66000		28,0(
MUNCI DEPOSITS													
MISC DEPOSIT				500							500		
CC DEPOSIT	1,600			2,500		1,000		1,000			2.60C		:.0(
FUEL DEPOSI:				15,200							12.000		
PAYROLL CASH OUT:													
CORP PAYROL:	5.707							5,600					
UNIT PAYROLL	28.363							42,000					
PAYROLL TAXES	17.235							24.000					
MANUAL P/R CHECKS	12,900												
INSURANCE:													
HEALTH	8.600												
WORKERS COMP													
G/L PROPERTY	2.158												
TAXES:													
MO SALES				7,471									
KS SALES													
IN SALES				2.700									
IL SALES				7,000							6,947		
OTHER CASH DISBURSED													
Prairie Farms Dairy				0				20,000			40,000		
Utilities deposits													
Utilities													
Rents				5,000									
Billboards								13,186					
COD FUEL				15,000							10,500		
COD FOOD						1,300							5.00(
COD R&M	2,100							2,100					
COD SERVICE				3,000			300						2.0(
COD LINEN				750									
COD OUTSIDE SERVICE					5,000	1,350		1,350					
MUNCI CASH DISBURSED				14,902	12304						5,000		
DAILY BALANCE	(857)	(857)	(857)	35,520	18,216	45,366	45,066	(32,964)	(32,964)	(32,964)	(14,911)	(14,911)	7,069

BEST AVAILABLE COPY

HEN HOUSE INTERSTATE
CASH FLOW

PAGE 2 OF 2

SEP THUR 19TH	SEP FRI 20TH	SEP SAT 21ST	SEP SUN 22ND	SEP MON 23RD	SEP TUES 24TH	SEP WED 25TH	SEP THUR 26TH	SEP FRI 27TH	SEP SAT 28TH
7,089	7,089	(31,861)	(31,861)	(31,861)	(33,761)	(33,761)	(4,761)	(4,761)	(30,611)
	28,000			69,000		26,000		28,000	
				500					
	1,000			2,000		1,000		1,000	
				12,700					
	5,100							5,400	
	27,000							42,000	
	17,500							24,500	
	8,700								
				3,500					
	2,700								
				6,500					
				60,000					
	3,500								
				11,100					
	2,100							2,100	
	1,350							1,350	
				3,000					
7,089	(31,861)	(31,861)	(31,861)	(33,761)	(33,761)	(4,761)	(4,761)	(30,611)	(30,611)

Emergency Order to Obtain Post-Petition Secured Credit

HEN HOUSE INTERSTATE
RESTAURANT & CORPORATE
OVERHEAD BUDGET

STORES TO CLOSE	SEP 13 STORES -- 3 WEEKS	OCT 13 STORES -- 4 WEEKS	NOV 13 STORES PKS, 097 4 WEEKS	DEC 12 STORES LED 3 WEEKS	JAN 11 STORES CAR 4 WEEKS	FEB 11 STORES -- 4 WEEKS	MAR 11 STORES -- 3 WEEKS	APR 11 STORES -- 4 WEEKS	MAY 11 STORES -- 4 WEEKS	JUN 11 STORES -- 3 WEEKS	JUL 11 STORES -- 4 WEEKS	AUG 11 STORES -- 4 WEEKS	SEP 11 STORES -- 3 WEEKS	13 MONTHS ENDED SEP 92 TOTAL
NET FOOD	390,000	463,100	603,603	395,726	276,782	308,742	421,500	392,500	441,000	334,300	322,200	317,500	344,700	5,023,762
NET GIFT	9,375	7,500	6,500	7,500	5,500	5,500	8,500	7,500	7,500	10,000	10,000	10,000	12,500	107,875
TOTAL SALES	699,183	870,600	810,103	603,226	282,283	314,242	430,000	400,000	448,500	344,300	332,200	327,500	339,200	5,913,577
FOOD (LESS CREDITS & REBATES)	143,572	137,344	110,990	100,825	76,115	94,904	118,820	109,900	123,480	133,820	146,216	103,500	133,076	1,621,782
GIFTS	3,625	4,500	3,900	4,500	3,300	3,300	5,100	4,500	4,500	6,000	6,000	6,000	7,500	68,725
TOTAL COST OF GOODS SOLD	169,197	131,844	114,890	113,325	79,415	98,204	123,120	114,400	127,980	141,820	152,216	109,500	140,576	1,686,367
GROSS MARGIN	434,986	338,776	295,213	289,901	202,868	226,038	306,880	285,600	320,520	604,480	379,984	373,000	398,624	6,257,870
PAYROLL	137,000	120,720	110,829	114,919	92,153	97,415	129,600	112,000	121,995	107,290	138,372	133,850	130,984	1,670,115
PAYROLL TAX	20,249	16,076	14,901	14,813	12,007	12,557	15,652	14,560	15,742	14,148	17,998	17,661	19,678	210,082
WORKERS COMPENSATION	8,592	8,592	8,592	8,592	8,592	8,592	8,600	8,600	8,600	8,600	8,600	8,600	8,600	111,732
BENEFITS	3,142	3,118	2,871	2,873	2,775	2,922	3,010	2,800	3,027	3,482	3,459	3,396	3,775	60,871
MANAGER BONUS	1,500	1,500	1,300	1,200	1,100	1,100	1,200	1,200	1,200	1,200	1,200	1,200	1,200	16,100
TOTAL LABOR EXPENSE	170,571	154,006	142,393	142,397	117,647	122,586	148,862	139,160	149,663	179,920	169,629	164,707	184,187	2,067,270
OPERATING SUPPLIES	10,870	11,579	11,100	11,072	8,303	9,262	8,030	7,850	8,020	11,130	10,040	10,250	10,934	130,040
SMALLWARES/UTENSILS	3,990	4,632	4,036	3,936	3,333	3,693	4,323	3,888	4,615	8,340	7,833	7,688	8,201	82,384
LINEN/UNIFORMS	3,750	3,000	2,600	3,000	2,200	2,200	2,200	2,200	2,200	2,200	2,200	2,200	2,200	32,150
MENUS/GUEST CHECKS	300	300	260	240	220	220	220	220	220	220	220	220	220	3,060
OUTSIDE SERVICES	6,750	6,750	5,850	5,400	4,950	4,950	4,950	4,950	4,950	4,950	4,950	4,950	4,950	69,300
EQUIPMENT LEASES	2,025	2,025	1,755	1,620	1,485	1,485	1,485	1,485	1,485	1,485	1,485	1,485	1,485	20,790
REPAIRS & MAINTENANCE	10,500	10,500	9,100	8,400	7,700	7,700	7,700	7,700	7,700	7,700	7,700	7,700	7,700	107,800
ADVERTISING / BILLBOARD	13,100	11,769	11,170	11,095	9,631	9,750	9,200	9,200	9,200	9,200	9,200	9,200	9,200	131,199
PROMOTION	1,000	1,000	1,560	1,040	1,320	1,320	1,320	1,320	1,320	1,320	1,320	1,320	1,320	18,480
WASTE/ QUALITY CONTROL	1,200	1,200	1,040	960	880	880	880	880	880	880	880	880	880	11,760
UTILITIES	32,500	32,500	43,500	43,000	43,000	42,000	39,000	39,000	39,000	39,000	39,000	39,000	39,000	533,500
TELEPHONE	2,250	2,250	1,950	1,800	1,650	1,650	1,800	1,650	1,650	1,800	1,650	1,650	1,800	23,350
CREDIT CARD EXPENSE	2,115	1,671	1,413	1,382	973	1,000	1,200	1,200	1,200	1,200	1,200	1,200	1,200	16,900
CASH OVER/SHORT	1,000	900	900	900	750	750	700	700	700	700	700	700	700	10,100
OFFICE SUPPLIES	1,500	1,500	1,500	1,200	1,100	1,100	1,000	1,000	1,000	1,000	1,000	1,000	1,000	14,700
TOTAL OPERATING	89,680	82,326	79,338	80,245	69,697	69,950	66,328	65,163	66,860	91,053	89,202	89,363	90,710	1,230,621
RENT/ALLOCATION	16,668	16,668	16,668	12,248	12,248	12,248	12,248	12,248	12,248	12,248	12,248	12,248	12,248	165,829
RENT OVERAGE	0	3,000	0	0	2,250	0	0	2,250	0	0	3,000	0	0	10,500
INSURANCE	3,150	3,150	3,150	3,150	3,150	3,150	3,150	3,150	3,150	3,150	3,150	3,150	3,150	41,850
TOTAL FIXED EXPENSE	19,818	22,818	19,818	15,398	17,648	15,398	15,398	17,648	15,398	15,398	18,398	15,398	15,398	218,179
RESTAURANT NET INCOME (CASH)	107,121	31,838	33,676	31,853	(22,132)	(1,904)	36,204	63,621	68,589	108,307	102,756	101,575	100,322	881,332
CORPORATE OVERHEAD (CASH)	33,379	46,792	46,792	33,379	46,792	46,792	33,379	46,792	46,792	33,379	46,792	46,792	33,379	631,731
NET INCOME/(LOSS) (CASH)	31,742	5,046	(13,116)	(23,526)	(68,924)	(48,696)	903	13,171	21,797	62,923	33,164	54,733	32,943	130,121 --313 stores

HEN HOUSE INTERSTATE
OMNI OUTDOOR ADVERTISING
BUDGET PROJECTION
SEPTEMBER 30, 1992

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C:calc992

	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	TOTAL ACCOUNTS FY92
3010 SALES - NATIONAL POSITIVE	3,300.00	3,300.00	3,300.00	2,500.00	3,300.00	4,000.00	4,000.00	3,000.00	3,000.00	3,300.00	2,500.00	3,000.00	36,300.00
3020 SALES - LOCAL POSITIVE	36,000.00	36,000.00	36,000.00	36,000.00	30,300.00	32,000.00	34,000.00	34,000.00	36,000.00	32,000.00	34,500.00	65,000.00	419,000.00
3030 SALES - NATIONAL PRIORITY	1,300.00	1,300.00	1,300.00	1,300.00	1,300.00	1,300.00	1,300.00	1,300.00	1,300.00	1,300.00	1,300.00	1,300.00	15,600.00
3040 SALES - LOCAL PRIORITY	9,300.00	9,000.00	9,750.00	9,750.00	10,000.00	10,000.00	12,500.00	12,000.00	10,000.00	11,500.00	10,500.00	11,000.00	125,300.00
3075 SALES - OTHER	150.00	150.00	150.00	150.00	150.00	150.00	150.00	150.00	150.00	150.00	150.00	150.00	1,800.00
3110 AGENCY COMMISSIONS - POSITIVE	11,000.00	11,000.00	11,000.00	11,300.00	11,475.00	11,850.00	11,700.00	11,700.00	11,000.00	11,600.00	11,775.00	12,750.00	139,750.00
3120 AGENCY COMMISSIONS - PRIORITY	165.00	165.00	165.00	165.00	165.00	165.00	165.00	165.00	165.00	165.00	165.00	165.00	1980.00
3130 CONTINUITY DISCOUNTS - POSITIVE	750.00	900.00	900.00	300.00	330.00	375.00	250.00	900.00	900.00	300.00	450.00	300.00	5,375.00
3140 CONTINUITY DISCOUNTS - PRIORITY	80.00	80.00	90.00	80.00	80.00	90.00	80.00	80.00	80.00	80.00	80.00	80.00	960.00
3220 ILLUMINATION CREDITS - POSITIVE	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
3230 ILLUMINATION CREDITS - PRIORITY	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
TOTAL INCOME	847,615.00	850,363.00	854,715.00	842,725.00	848,370.00	850,990.00	850,615.00	849,162.00	847,865.00	847,163.00	847,690.00	857,345.00	8383,895.00

EXPENSES

		OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	FY92
0160 AUTO ALLOWANCE	1	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,200.33	711.75	12,000.00
0180 AUTO LEASE EXPENSE	2	330.00	330.00	330.00	330.00	330.00	330.00	330.00	330.00	330.00	330.00	330.00	330.00	3,960.00
0170 AUTO EXPENSE	3	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	7,200.00
0210 BAD DEBT EXPENSE	4	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	1,200.00
0030 SALES COMMISSIONS	5	2,370.75	2,370.75	2,505.75	2,115.75	2,019.50	2,349.50	2,330.75	2,450.75	2,253.75	2,250.75	2,309.50	2,075.75	29,150.75
0130 CONTRACTED CARE HOME	6	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	3,600.00
0000 CONTRACTED DISPOSITION	7	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
0110 CONTRACTED POSITIVE	8	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
0120 CONTRACTED ART DESIGN	9	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
0250 CONTRIBUTIONS	10	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
0110 DEPR - SHOP EQUIP	11	65.00	65.00	65.00	65.00	65.00	65.00	65.00	65.00	65.00	65.00	65.00	780.00	780.00
0115 DEPR EXP - L/H IMPROVEMENTS	12	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
0150 SHORT L/H ACQUISITION COSTS	13	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
5100 DEPR - PRINTS PLANT	14	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	36,000.00
4300 DEPRECIATION - PURCHASE	15	11,300.00	11,300.00	11,300.00	11,300.00	11,300.00	11,300.00	11,300.00	11,300.00	11,300.00	11,300.00	11,300.00	11,300.00	135,600.00
0130 DEPR - PRESS AND FRAMES	16	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	7,200.00
0305 DEPR - BUILDING	17	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	3,600.00
0320 DEPR - FURN AND FIX	18	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	1,200.00
0330 DEPR - OFFICE EQUIP	19	175.00	175.00	175.00	175.00	175.00	175.00	175.00	175.00	175.00	175.00	175.00	175.00	2,100.00
0340 DUES AND SUBSCRIPTIONS	20	75.00	75.00	75.00	75.00	75.00	75.00	75.00	75.00	75.00	75.00	75.00	75.00	900.00
0570 INSURANCE - GROUP	21	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	1,100.00	1,600.00	1,600.00	1,600.00	19,700.00
0106 CONTRIBUTIONS	22	225.00	225.00	225.00	225.00	225.00	225.00	225.00	225.00	225.00	225.00	225.00	225.00	2,700.00
4570 DUES CHAMBER DENTAL - PRESALES	23	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	600.00
4310 CONSULT - SUBSCRIBERS	24	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	120.00
0150 INSURANCE - PROPERTY	25	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	600.00
0510 INSURANCE - AUTOS/TRUCKS	26	800.00	800.00	800.00	800.00	800.00	800.00	800.00	800.00	800.00	800.00	800.00	800.00	9,600.00
4560 INSURANCE - WORKMEN'S COMP	27	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	7,200.00
0530 INSURANCE - LIABILITY	28	275.00	275.00	275.00	275.00	275.00	275.00	275.00	275.00	275.00	275.00	275.00	275.00	3,300.00
9010 INTEREST EXPENSE	29	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
9050 MANAGEMENT FEES	30	2,370.75	2,370.75	2,505.75	2,115.75	2,019.50	2,349.50	2,330.75	2,450.75	2,253.75	2,250.75	2,309.50	2,075.75	29,150.75
5210 MATERIAL - ILLUS - PRINTS	31	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	600.00
5250 DYNO MATERIALS - PRINTS	32	60.00	60.00	60.00	60.00	60.00	60.00	60.00	60.00	60.00	60.00	60.00	60.00	720.00
5210 MATERIAL - PAINT SUPPLIES	33	150.00	150.00	150.00	150.00	150.00	150.00	150.00	150.00	150.00	150.00	150.00	150.00	1,800.00
4250 MATERIALS - STEEL & PIPE - P34		0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
4250 MATERIALS - PAPER AND PASTES	35	900.00	900.00	900.00	900.00	900.00	900.00	900.00	900.00	900.00	900.00	900.00	10,800.00	10,800.00

[illegible] Budget Projection 9/30/92 Level C:calc992 03-Dec-91 Page 2

		TOTAL ACCOUNTS FY92		SUMMARY ACCOUNTS FY92	
36,300.00 Sales					1
419,000.00 Sales					1
15,600.00 Sales					1
125,300.00 Sales					1
1,800.00 Sales					1
139,750.00 Sales					1
1980.00 Sales					1
5,375.00 Sales					1
960.00 Sales					1
0.00 Sales					1
0.00 Sales					1
8383,895.00	Net Sales		Net Sales		
12,000.00 Auto expense					1
3,960.00 Auto expense					1
7,200.00 Auto expense	Auto expense		Auto expense		1
1,200.00 Bad Debt expense	Bad Debt expense		Bad Debt expense		1
29,150.75 Commissions	Commissions		Commissions		1
3,600.00 Contract work					1
0.00 Contract work					1
0.00 Contract work					1
0.00 Contract work	Contract work		Contract work		1
0.00 Contributions	Contributions		Contributions		1
780.00 Depreciation					1
0.00 Depreciation					1
0.00 Depreciation					1
36,000.00 Depreciation					1
135,600.00 Depreciation					1
7,200.00 Depreciation					1
3,600.00 Depreciation					1
1,200.00 Depreciation					1
2,100.00 Depreciation	Depreciation		Depreciation		1
900.00 Dues & Subscriptions	Dues & Subscriptions		Dues & Subscriptions		1
19,700.00 Employee benefits	Employee benefits		Employee benefits		1
2,700.00 Entertainment	Entertainment		Entertainment		1
600.00 Equipment rental	Equipment rental		Equipment rental		1
120.00 Freight	Freight		Freight		1
600.00 Insurance					1
9,600.00 Insurance					1
7,200.00 Insurance					1
3,300.00 Insurance	Insurance		Insurance		1
0.00 Interest Expense	Interest Expense		Interest Expense		1
29,150.75 Management fees	Management fees		Management fees		1
600.00 Materials-Paint					1
720.00 Materials-Paint					1
1,800.00 Materials-Paint	Materials-Paint		Materials-Paint		1
0.00 Materials-Paster					1
10,800.00 Materials-Paster					1

HEN HOUSE INTERSTATE
OMNI OUTDOOR ADVERTISING
BUDGET PROJECTION
SEPTEMBER 30, 1992

PAGE 2 OF 2

[illegible]		OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total Accounts FY0
[illegible] BINGO	36	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	600.00
[illegible] - ELVIS POSTERS	37	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	600.00
[illegible] - CONCRETE - POSTERS	38	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
BINGO EXPENSES - POSTERS	39	33.00	33.00	33.00	33.00	33.00	33.00	33.00	33.00	33.00	33.00	33.00	33.00	396.00
[illegible]	40	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	1,200.00
BINGO EXPENSE - PRIZES	41	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	120.00
OFFICE SUPPLIES	42	125.00	125.00	125.00	125.00	125.00	125.00	125.00	125.00	125.00	125.00	125.00	125.00	1,500.00
PHOTOGRAPHY EXPENSE	43	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
P/R TAXES - FUTA	44	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	120.00
P/R TAXES - FICA - PRINTS	45	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	1,200.00
P/R TAXES - SUI - PRINTS	46	2.50	2.50	2.50	2.50	2.50	2.50	2.50	2.50	2.50	2.50	2.50	2.50	30.00
P/R TAXES - FUTA - POSTERS	47	18.00	18.00	18.00	18.00	18.00	18.00	18.00	18.00	18.00	18.00	18.00	18.00	216.00
P/R TAXES - SUI	48	6.00	6.00	6.00	6.00	6.00	6.00	6.00	6.00	6.00	6.00	6.00	6.00	72.00
P/R TAXES - FICA - POSTERS	49	0.50	0.50	0.50	0.50	0.50	0.50	0.50	0.50	0.50	0.50	0.50	0.50	6.00
P/R TAXES - SUI - POSTERS	50	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
P/R TAXES - FUTA - PRINTS	51	7.00	7.00	7.00	7.00	7.00	7.00	7.00	7.00	7.00	7.00	7.00	7.00	84.00
P/R TAXES - FICA	52	700.00	700.00	700.00	700.00	700.00	700.00	700.00	700.00	700.00	700.00	700.00	700.00	8,400.00
POSTAGE, EXPRESS AND FREIGHT	53	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	1,200.00
PROFESSIONAL FEES	54	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
REPAIRS AND MAINT	55	575.00	575.00	575.00	575.00	575.00	575.00	575.00	575.00	575.00	575.00	575.00	575.00	6,900.00
SALARIES - SALES	56	2,600.00	2,600.00	2,600.00	2,600.00	2,600.00	2,600.00	2,600.00	2,600.00	2,600.00	2,600.00	2,600.00	2,600.00	31,200.00
SALARY - OFFICE/POSTERS	57	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	60,000.00
SALARY - PRINTERS	58	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	15,000.00
SALARIES - ADMIN	59	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	60,000.00
SUPPLIES - WELDING	60	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	120.00
SUPPLIES - SHOP	61	200.00	200.00	200.00	200.00	200.00	200.00	200.00	200.00	200.00	200.00	200.00	200.00	2,400.00
SITE LEASES - POSTERS	62	3,500.00	3,500.00	3,500.00	3,500.00	3,500.00	3,500.00	3,500.00	3,500.00	3,500.00	3,500.00	3,500.00	3,500.00	42,000.00
SITE LEASES - PRINTS	63	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	18,000.00
TAXES AND LICENSES	64	800.00	800.00	800.00	800.00	800.00	800.00	800.00	800.00	800.00	800.00	800.00	800.00	9,600.00
TAX PENALTIES	65	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
TRAVEL	66	75.00	75.00	75.00	75.00	75.00	75.00	75.00	75.00	75.00	75.00	75.00	75.00	900.00
TELEPHONE	67	450.00	450.00	450.00	450.00	450.00	450.00	450.00	450.00	450.00	450.00	450.00	450.00	5,400.00
UTILITIES	68	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
ELECTRICITY - POSTERS	69	900.00	900.00	900.00	900.00	900.00	900.00	900.00	900.00	900.00	900.00	900.00	900.00	10,800.00
ELECTRICITY - PRINTS	70	250.00	250.00	250.00	250.00	250.00	250.00	250.00	250.00	250.00	250.00	250.00	250.00	3,000.00
UTILITIES	71	325.00	325.00	325.00	325.00	325.00	325.00	325.00	325.00	325.00	325.00	325.00	325.00	3,900.00
TOTAL EXPENSES		$32,695.00	$33,010.00	$33,129.00	$32,329.00	$31,996.00	$33,056.00	$32,019.00	$32,076.00	$32,644.00	$32,674.00	$33,013.00	$31,439.00	$391,995.00
OTHER INCOME		0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
GAIN / LOSS SALE OF ASSETS		0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
PROVISION FOR TAXES		500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	6,000.00
OTHER INCOME & EXPENSE		500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	6000.00
NET PROFIT/(LOSS)		($3,695.00)	($3,845.00)	($3,815.00)	($4,015.00)	($3,996.00)	($4,044.00)	($3,844.00)	($4,109.00)	($3,999.00)	($3,945.00)	($3,725.00)	($3,694.13)	($45,390.00)

Detail Accounts FY0		Summary Accounts FY0	
600.00 Materials-Poster			1
600.00 Materials-Poster			1
0.00 Materials-Poster	Materials-Poster	12,000.00	Materials-Poster 1
420.00 Miscellaneous			1
1,200.00 Miscellaneous			2
120.00 Miscellaneous-Poster	Miscellaneous expense	1,740.00	Miscellaneous-Post 1
1,500.00 Office Supplies			2
0.00 Office Supplies	Office supplies	1,500.00	Office supplies 2
129.00 Payroll Taxes			1
1,200.00 Payroll Taxes			1
28.00 Payroll Taxes			1
216.00 Payroll Taxes			1
72.00 Payroll Taxes			1
6.00 Payroll Taxes			1
48.00 Payroll Taxes			1
84.00 Payroll Taxes			1
8,400.00 Payroll Taxes	Payroll Taxes	10,170.00	Payroll Taxes 1
1,200.00 Postage	Postage	1,200.00	Postage 2
0.00 Professional Fees	Professional Fees	0.00	Professional Fees 2
6,900.00 Repairs & Maintenance	Repairs & Maintenance	6,900.00	Repairs & Maintenan 2
31,200.00 Salaries			1
60,000.00 Salaries			1
15,000.00 Salaries			1
60,000.00 Salaries	Salaries	166,200.00	Salaries 2
120.00 Shop Supplies			1
2,400.00 Shop Supplies	Shop Supplies	2,520.00	Shop Supplies 1
42,000.00 Site Leases			1
18,000.00 Site Leases	Site Leases	84,000.00	Site Leases 1
9,600.00 Taxes & Licenses			2
0.00 Taxes & Licenses			2
900.00 Taxes & Licenses	Taxes & Licenses	10,500.00	Taxes & Licenses 1
5,400.00 Telephone	Telephone	5,400.00	Telephone 2
0.00 Travel	Travel	0.00	Travel 2
10,800.00 Utilities			1
4,200.00 Utilities			1
3,900.00 Utilities			1
$433,395.00			
0.00			
0.00			
6,000.00			
6000.00			
($33,390.00)			

TOTAL EXPENSES	$431,395.00
NET INCOME (LOSS)	($50,790.00)
CASH FLOW PROJECTIONS:	
NET INCOME (LOSS)	($50,790.00)

Detail Accounts FY0		Summary Accounts FY0
Net Depreciation		$85,200.00
Management Fees		79,150.25
Projected cash flow		($43,039.75)

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FINAL ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION AUTHORIZING DEBTOR TO OBTAIN POST-PETITION SECURED CREDIT, GRANTING SENIOR LIENS AND ADMINISTRATIVE PRIORITY EXPENSE, MODIFYING AUTOMATIC STAY, PROVIDING ADEQUATE PROTECTION, AND AUTHORIZING AGREEMENTS WITH LANDMARK BANK OF ILLINOIS DATED OCTOBER 25, 1991

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Proceedings Under Chapter 11

Case No. 91-45623-293

Motions E and F

In Re:

HEN HOUSE INTERSTATE, INC.,

Debtor.

FINAL ORDER AUTHORIZING DEBTOR TO OBTAIN POST-PETITION SECURED CREDIT, GRANTING SENIOR LIENS AND ADMINISTRATIVE PRIORITY EXPENSE, MODIFYING AUTOMATIC STAY, PROVIDING ADEQUATE PROTECTION AND AUTHORIZING AGREEMENTS WITH LANDMARK BANK OF ILLINOIS

Final Order to Obtain Post-Petition Secured Credit

This matter is before the Court for a final hearing on Debtor's *Emergency Motion For Order Authorizing Debtor to Obtain Post-Petition Financing Pursuant to 11 U.S.C. §364, to Utilize Cash Collateral Pursuant to 11 U.S.C. §363, and Granting Adequate Protection to Pre-Petition Secured Party* (the "Debtor's Motion") filed by the above Debtor and for a final hearing on the *Emergency Motion for Relief From Automatic Stay or, in the Alternative for Adequate Protection, and for Order Denying Use of Cash Collateral and Requiring Segregation and Accounting of Cash Collateral* (the "Landmark Motion") filed by Landmark Bank of Illinois ("Landmark"), the Court having entered an *Emergency Order Authorizing Debtor to Obtain Post-Petition Secured Credit, Granting Senior Liens and Administrative Priority Expense, Modifying Automatic Stay, Providing Adequate Protection and Authorizing Agreements with Landmark Bank of Illinois* (the "Emergency Order") on September 6, 1991, the Debtor having provided more than 15 days notice to the Debtor's 20 largest unsecured creditors, the United States Trustee and Landmark of the final hearing on these matters and of the opportunity to object, timely objections to the Emergency Order becoming final having been filed by the United States Trustee, Allen Foods, Inc., and Adrian N. Baker and Company, the Court having allowed Larry Rugg to file a late objection, the Court having entered an Order on October 22, 1991, sustaining certain objections to the original form of final order submitted to the Court, Debtor and Landmark having filed on October 24, 1991, a *Joint Motion for Reconsideration of Court's Order of October 22, 1991* (the "Reconsideration Motion"), pursuant to which a modified form of final order was submitted to the Court containing modifications substantially in compliance

with the rulings contained in the Court's October 22, 1991, Order and pursuant to which the Debtor and Landmark requested the Court to reconsider its ruling on certain matters, Debtor and Landmark having agreed to the entry of this Order, the relief granted hereby and the terms and conditions herein set forth, and on the basis of representations made and testimony received from the Debtor, and upon the record in these Chapter 11 proceedings, the Court finds and determines that it is in the best interests of Debtor's estate and its creditors and that there is good cause to grant the relief requested in the Reconsideration Motion, the Debtor's Motion and the Landmark Motion herein provided. The Court finds, after considering all the testimony in this matter and after reviewing the documents submitted into evidence, that the Debtor has a reasonable possibility of reorganizing if the Court grants the relief provided herein. The Court finds that the Debtor does not otherwise have funds available to meet payroll and other necessary expenses, that the Debtor is unable to obtain credit other than on the basis provided herein, that the ability of the Debtor to continue its business, remain a viable entity and have an opportunity to reorganize under Chapter 11 of the Bankruptcy Code depends on obtaining post-petition secured financing from Landmark on the terms provided herein, and that absent the relief provided herein, Debtor's estate would suffer immediate and irreparable harm. The Court finds that the notice hereof having been provided is, under the circumstances, adequate and sufficient and complies with the requirements of 11 U.S.C. §§102(1) and 361 through 364 and Bankruptcy Rule 4001, and any notice periods in excess hereof are hereby shortened to conform to the notices given herein. The Court further finds that Debtor and Landmark have acted in good

faith (as used in §364(e) of the Bankruptcy Code) with respect to the extension of credit authorized pursuant to this Order and all other aspects of this Order, and that the relief requested and the terms and conditions set forth herein are in the best interests of Debtor's estate and its creditors.

ACCORDINGLY, IT IS, HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334, as this matter arises in the Chapter 11 case of Debtor. No trustee has been appointed and Debtor has remained in possession of its estate.

2. Landmark is the holder of a certain revolving line of credit note, executed and delivered by the Debtor as of June 2, 1987 in consideration of a loan by Landmark to the Debtor, wherein the Debtor promised to pay to Landmark the principal sum of $350,000.00 with interest thereon, as more fully set forth therein (the "Revolving Note"). A true and correct copy of the Revolving Note has been filed by Landmark under separate cover as Exhibit 1 to the Landmark Motion and is incorporated herein by reference.

3. Landmark is the holder of a certain term promissory note, executed and delivered by the Debtor as of June 2, 1987 in consideration of a loan by Landmark to the Debtor, wherein the Debtor promised to pay to Landmark the principal sum of $4,460,000.00 with interest thereon, as more fully set forth therein (the "Term Note"). A true and correct copy of the Term Note has been filed by Landmark under separate cover as Exhibit 2 to the Landmark Motion and is incorporated herein by reference.

4. Landmark is the holder of a certain promissory note, executed and delivered by the Debtor as of March 31, 1991 in consideration of a loan by Landmark to the Debtor, wherein the Debtor promised to pay to Landmark the principal sum of $53,000.00 with interest thereon as more fully set forth therein (the "Promissory Note"). A true and correct copy of the Promissory Note has been filed by Landmark under separate cover as Exhibit 3 to the Landmark Motion and is incorporated herein by reference.

5. The Revolving Note and Term Note were amended pursuant to a First Amendment to Promissory Notes ("First Amendment to Notes") dated December 28, 1990. A true and correct copy of the First Amendment to Notes has been filed by Landmark under separate cover as Exhibit 4 to the Landmark Motion and incorporated herein by reference. The Revolving Note, Term Note, First Amendment to Notes and Promissory Note are hereinafter collectively referred to as the "Notes").

6. In connection with the execution of the Notes, the Debtor and Landmark entered into a loan agreement executed May 15, 1987 (the "Original Loan Agreement"). A true and correct copy of the original Loan Agreement has been filed by Landmark under separate cover as Exhibit 5 to the Landmark Motion and is incorporated herein by reference.

7. The Loan Agreement was amended pursuant to a First Amendment to Loan Agreement ("Loan Agreement Amendment #1") dated December 28, 1990. A true and correct copy of the Loan Agreement Amendment #1 has been filed by Landmark under separate cover as Exhibit 6 to the Landmark Motion and is incorporated herein by reference.

8. The Loan Agreement was again amended pursuant to a Second Amendment to Loan Agreement ("Loan Agreement Amendment #2") dated March 31, 1991. A true and correct copy of the Loan Agreement Amendment #2 has been filed by Landmark under separate cover as Exhibit 7 to the Landmark Motion and incorporated herein by reference. The original Loan Agreement, Loan Agreement Amendment #1 and Loan Agreement Amendment #2 are hereinafter collectively referred to as the "Loan Agreement."

9. The Debtor executed and delivered to Landmark the following documents in order to secure the repayment of all obligations of Debtor to Landmark:

a. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 1524, Page 727 in the records of the Recorder's Office of the County of Champaign, State of Illinois (the "Champaign County Mortgage"), which encumbers certain premises in the County of Champaign, State of Illinois, described more fully therein (the "Champaign County Premises"). A true and correct copy of the Champaign County Mortgage has been filed by Landmark under separate cover as Exhibit 8 to the Landmark Motion and is incorporated herein by reference.

b. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 148, Page 320 in the records of the Recorder's Office of the County of DeWitt, State of Illinois (the "DeWitt County Mortgage"), which encumbers certain premises in the County of DeWitt, State of Illinois, described more fully

therein (the "DeWitt County Premises"). A true and correct copy of the DeWitt County Mortgage has been filed by Landmark under separate cover as Exhibit 9 to the Landmark Motion and is incorporated herein by reference.

c. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number 180011 in the records of the Recorder's Office of the County of Ford, State of Illinois (the "Ford County Mortgage"), which encumbers certain premises in the County of Ford, State of Illinois, described more fully therein (the "Ford County Premises"). A true and correct copy of the Ford County Mortgage has been filed by Landmark under separate cover as Exhibit 10 to the Landmark Motion and is incorporated herein by reference.

d. Deed of Trust given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number 1775025 at I1683P226! et. seq. in the records of the Recorder's Office of the County of Jackson, State of Missouri (the "Jackson County Deed"), which encumbers certain premises in the County of Jackson, State of Missouri, described more fully therein (the "Jackson County Premises"). A true and correct copy of the Jackson County Deed has been filed by Landmark under separate cover as Exhibit 11 to the Landmark Motion and is incorporated herein by reference.

e. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 173, Page 518 in

the records of the Recorder's Office of the County of Laurel, State of Kentucky (the "Laurel County Mortgage"), which encumbers certain premises in the County of Laurel, State of Kentucky, described more fully therein (the "Laurel County Premises"). A true and correct copy of the Laurel County Mortgage has been filed by Landmark under separate cover as Exhibit 12 to the Landmark Motion and is incorporated herein by reference.

f. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 3423, Page 1266 in the records of the Recorder's Office of the County of Madison, State of Illinois (the "Madison County Mortgage"), which encumbers certain premises in the County of Madison, State of Illinois, described more fully therein (the "Madison County Premises"). A true and correct copy of the Madison County Mortgage has been filed by Landmark under separate cover as Exhibit 13 to the Landmark Motion and is incorporated herein by reference.

g. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 399, Page 485 in the records of the Recorder's Office of the County of Marion, State of Illinois (the "Marion County Mortgage"), which encumbers certain premises in the County of Marion, State of Illinois, described more fully therein (the "Marion County Premises"). A true and correct copy of the Marion County Mortgage has been filed by Landmark under separate cover as Exhibit 14 to the Landmark Motion and incorporated herein by reference.

h. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number 87-10253 in the records of the Recorder's Office of the County of McLean, State of Illinois (the "McLean County Mortgage"), which encumbers certain premises in the County of McLean, State of Illinois, described more fully therein (the "McLean County Premises"). A true and correct copy of the McLean County Mortgage has been filed by Landmark under separate cover as Exhibit 15 to the Landmark Motion and is incorporated herein by reference.

i. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 374, Page 247 in the records of the Recorder's Office of the County of Morgan, State of Indiana (the "Morgan County Mortgage"), which encumbers certain premises in the County of Morgan, State of Indiana, described more fully therein (the "Morgan County Premises"). A true and correct copy of the Morgan County Mortgage has been filed by Landmark under separate cover as Exhibit 16 to the Landmark Motion and is incorporated herein by reference.

j. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 1987, Page 7516 in the records of the Recorder's Office of the County of Delaware, State of Indiana (the "Delaware County Mortgage"), which encumbers certain premises in the County of Delaware, State of Indiana, described more fully therein (the "Delaware County Premises"). A true and correct copy of the Delaware County Mortgage has

been filed by Landmark under separate cover as Exhibit 17 to the Landmark Motion and is incorporated herein by reference.

k. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded in Book 2676, Page 1130 in the records of the Recorder's Office of the County of St. Clair, State of Illinois (the "St. Clair County Mortgage"), which encumbers certain premises in the County of St. Clair, State of Illinois, described more fully therein (the "St. Clair County Premises"). A true and correct copy of the St. Clair County Mortgage has been filed by Landmark under separate cover as Exhibit 18 to the Landmark Motion and is incorporated herein by reference.

l. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number 167252 in Book 367, Page 345 in the records of the Recorder's Office of the County of Washington, State of Illinois (the "Washington County Mortgage"), which encumbers certain premises in the County of Washington, State of Illinois, described more fully therein (the "Washington County Premises"). A true and correct copy of the Washington County Mortgage has been filed by Landmark under separate cover as Exhibit 19 to the Landmark Motion and is incorporated herein by reference.

m. Mortgage given by the Debtor to Landmark dated May 15, 1987 and recorded as Document Number R87-28965 in the records of the Recorder's Office of

the County of Will, State of Illinois (the "Will County Mortgage"), which encumbers certain premises in the County of Will, State of Illinois, described more fully therein (the "Will County Premises"). A true and correct copy of the Will County Mortgage has been filed by Landmark under separate cover as Exhibit 20 to the Landmark Motion and is incorporated herein by reference.

n. Collateral Pledge Agreement by the Debtor to Landmark dated May 15, 1987 (the "Collateral Pledge") wherein Debtor pledged to Landmark a certificate of deposit and other items as more fully described therein. A true and correct copy of the Collateral Pledge has been filed by Landmark under separate cover as Exhibit 21 to the Landmark Motion and is incorporated herein by reference.

o. Security Agreement-Equipment by the Debtor to Landmark dated May 15, 1987 (the "Equipment Security Agreement") wherein the Debtor granted to Landmark a security interest in furniture, fixtures, equipment, and machinery of every kind and nature, as more fully set forth in the Equipment Security Agreement. A true and correct copy of the Equipment Security Agreement has been filed by Landmark under separate cover as Exhibit 22 to the Landmark Motion and is incorporated herein by reference.

p. Security Agreement (Inventory-Accounts Receivable) by the Debtor to Landmark dated May 15, 1987 (the "Inventory Security Agreement") wherein the

Debtor granted to Landmark a security interest in the Debtor's inventory and accounts receivable as more fully set forth in the Inventory Security Agreement. A true and correct copy of the Inventory Security Agreement has been filed by Landmark under separate cover as Exhibit 23 to the Landmark Motion and is incorporated herein by reference.

q. Assignment of Interest in Contracts and Leases by the Debtor to Landmark dated May 15, 1987 (the "Contracts/Leases Assignment") wherein the Debtor assigned to Landmark all of the Debtor's right, title and interest in and to all contracts, permits, licenses, easements and leases, as more fully described therein. A true and correct copy of the Contracts/Leases Assignment has been filed by Landmark under separate cover as Exhibit 24 to the Landmark Motion and is incorporated herein by reference.

r. Assignment of Contract Rights by the Debtor to Landmark dated May 15, 1987 (the "Contract Rights Assignment") wherein the Debtor granted to Landmark a security interest in all of the Debtor's rights under a Management Services Agreement between the Debtor and Omni Outdoor Advertising, Inc. as more fully described therein. A true and correct copy of the Contract Rights Assignment has been filed by Landmark under separate cover as Exhibit 25 to the Landmark Motion and is incorporated herein by reference.

10. The Champaign County Mortgage, DeWitt County Mortgage, Ford County Mortgage, Jackson County Deed,

Laurel County Mortgage, Madison County Mortgage, Marion County Mortgage, McLean County Mortgage, Morgan County Mortgage, Delaware County Mortgage, St. Clair County Mortgage, Washington County Mortgage, Will County Mortgage, Collateral Pledge, Equipment Security Agreement, Inventory Security Agreement, Contracts/Lease Assignment and Contract Rights Assignment are hereinafter collectively referred to as the "Collateral Documents." The Notes, the Loan Agreement and the Collateral Documents are hereinafter sometimes collectively referred to as the "Loan Documents."

11. Perfection of Landmark's security interests granted in the Collateral Documents, was effectuated, *inter alia* by the filing of Uniform Commercial Code Financing Statements with the offices and in the indexes as noted thereon (the "Filings"). True and correct copies of the Filings have been filed by Landmark under separate cover as Exhibit 26 to the Landmark Motion and is incorporated herein by reference.

12. Pursuant to the Loan Documents, Debtor promised to pay all costs of collection of Landmark incurred in connection therewith, including, without limitation, reasonable costs, fees, attorneys' fees and expenses.

13. Debtor is in default of its obligations to Landmark under the Loan Documents.

14. As of the date Debtor filed its petition herein (the "Filing Date"), Debtor was indebted to Landmark in the

aggregate amount of $4,139,676.57, plus accruing interest,[1] costs, expenses and fees of collection (the "Indebtedness"). The validity and priority of the Indebtedness and the liens and security interests securing the Indebtedness are not subject to any setoff, recoupment, counterclaim, avoidance or other challenge or attack of any kind or nature. The Indebtedness is hereby allowed as a secured claim.

15. All of Debtor's cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents, proceeds, products, rents, or profits derived from Debtor's business or any other property subject to Landmark's security interests, whether existing before or after the Filing Date, constitute "cash collateral" pursuant to 11 U.S.C. §363 and is subject to the duly perfected liens of Landmark (the "Cash Collateral").

16. Substantially all real and all personal property of Debtor, including its fixtures, accounts, Cash Collateral, inventory, machinery, equipment, real estate and personal property of any nature whatsoever (collectively the "Collateral") is encumbered by and subject to the first priority, perfected liens of Landmark pursuant to the duly executed Loan Documents as security for repayment of the Indebtedness.

17. Pursuant to 11 U.S.C. §363, Debtor is prohibited from using, selling or leasing the Collateral for any purpose unless Landmark consents or the Court, after notice and a

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1. Interest has been calculated at the pre-default rate. This Order shall be without prejudice to Landmark's right to claim interest at the default rates specified in the Loan Documents

hearing, authorizes such use, sale, or lease in accordance with the provisions of 11 U.S.C. §363.

18. Pursuant to 11 U.S.C. §363(c)(4), Debtor is required to segregate and account for all Cash Collateral in its possession, custody or control.

19. 11 U.S.C. §363(e) requires that notwithstanding any other provision of said section, upon Landmark's request, the Court, with or without a hearing, shall prohibit or condition Debtor's use, sale or lease of any Collateral as is necessary to provide adequate protection of Landmark's interests therein.

20. Except upon further Order of this Court or upon default hereunder, Debtor, as debtor-in-possession, may continue to operate its business and to collect the cash, rents, profits and proceeds generated therefrom, limited solely to the ordinary course of business and in accordance with the provisions of this Order and the Bankruptcy Code.

21. All cash, cash equivalents, rents, profits, proceeds and income collected by the Debtor or on the Debtor's behalf shall be deposited and maintained at all times in a debtor-in-possession bank account(s) at Landmark (the "DIP Accounts") in accordance with 11 U.S.C. §345 and shall not be commingled with any other funds derived from any source whatsoever that do not constitute "Cash Collateral" under the terms of this Order.

22. Except as expressly permitted herein, Debtor shall not use any Cash Collateral in its possession, custody or

control at any time, and any cash previously or hereafter received by or on behalf of Debtor immediately shall be delivered to Landmark and used in accordance with the terms of the Post-Petition Loan Agreement (the "Post-Petition Loan Agreement") attached as Exhibit A to the Debtor's Motion and in accordance with the terms of this Order.

23. Debtor is hereby authorized pursuant to 11 U.S.C. §364 to enter into and execute the Post-Petition Loan Agreement, and all documents required thereby or in connection therewith, and borrow funds from Landmark pursuant thereto and pursuant to this Order. In addition to the authorization in the Emergency Order to borrow up to $50,000, the Debtor is hereby authorized to borrow up to the balance of the financing available under the Post-Petition Loan Agreement. The indebtedness incurred under the Post-Petition Loan Agreement shall be secured and collateralized as provided herein. All amounts advanced under the Post-Petition Loan Agreement shall constitute post-petition loans (the "Post-Petition Loans") by Landmark to, and debts of, Debtor bearing interest at the rate provided therein. All obligations described herein, including the Indebtedness and the Post-Petition Loans, are hereby ordered and adjudicated to be binding and enforceable obligations of the Debtor. The Post-Petition Loans shall mature and become immediately due and payable upon the earliest of (i) default hereunder, (ii) default under the Post-Petition Loan Agreement or (iii) the maturity date specified in the Post-Petition Loan Agreement (or any extended maturity date that may be agreed to in writing by Landmark), at which time the Indebtedness, the Post-Petition Loans and all other obligations of the Debtor to Landmark shall be immediately

due and payable. Landmark's obligation to make advances pursuant to the Post-Petition Loan Agreement shall at all times be entirely discretionary on Landmark's part, and in any event shall terminate upon Debtor's default hereunder or upon maturity of the Post-Petition Loans unless the maturity of the Post-Petition Loans is extended, or the Post-Petition Loans are renewed, as hereinafter provided. Landmark may, in its sole discretion, elect to extend the maturity of the Post-Petition Loans, but Landmark shall have no obligation whatsoever to so extend.

24. Subject to the terms hereof and Debtor's compliance herewith and so long as the Post-Petition Loans have not matured and are not in default, Debtor is hereby authorized to use the Cash Collateral and the proceeds of the Post-Petition Loans for the amounts set forth in the budget attached to the Emergency Order and incorporated therein by reference as Attachment 1 (the "Budget") for use solely for the payment of the expenses to the extent set forth in the Budget. Notwithstanding the foregoing, except for the $100,000 retainer of the Debtor's attorneys ($20,000 of which was deposited with the Debtor's attorneys following entry of the Emergency Order and the remaining $80,000 of which shall be deposited with the Debtor's attorneys following entry of this Order), the expenses designated in the Budget shall be limited to post-Filing Date expenses incurred in the ordinary course of Debtor's business, except as expressly authorized by separate Orders of this Court. Except as specifically authorized herein or by separate Orders of this Court, no transactions with, funds or payments to, or commitments to pay, any insider (except normal, reasonable salaries), affiliate or related entity of, or controlled (directly

or indirectly) by Debtor, shall be made, paid or disbursed by Debtor to any such insider, affiliate or related entity.

25. Debtor shall pay or cause to be paid all ordinary and necessary expenses of operation of its business and the costs required to care for, preserve and maintain the Collateral, which are allowed in the Budget, including, but not limited to, the following:

a. Utility costs and telephone charges;

b. Reasonable salaries to employees of Debtor;

c. Upkeep, maintenance and repairs;

d. Insurance so as to assure continued coverage of the Collateral in accordance with the Loan Documents;

e. Purchase or rental of necessary supplies and equipment;

f. Income, withholding, sales, use, real estate and other taxes, operating permit fees and other charges necessarily incurred in the ordinary course of the Debtor's business.

26. In order to protect Landmark against a decline in the value of its secured position in the Collateral, and to afford such other adequate protection as is required under the Bankruptcy Code:

a. The Debtor shall operate its business pursuant to the terms herein set forth and shall perform all of the obligations hereunder.

b. Landmark is hereby granted, to the extent not heretofore granted, a first, priority and perfected senior lien and security interest in all presently owned and hereafter acquired real and personal property, assets and rights of any kind and nature of Debtor, including all proceeds thereof, wherever located, to secure the Indebtedness, the Post-Petition Loans and all other obligations of the Debtor to Landmark, including interest, fees and expenses thereon, *provided, however*, that the grant of such liens is subject to a carve out of $10,000 (the "Carve Out") for professionals to be paid from the Debtor's estate. In accordance with 11 U.S.C. §507(b), to the extent the value of Landmark's security interests in the Collateral declines after entry of this Order notwithstanding the adequate protection herein set forth, or such adequate protection otherwise proves to be inadequate, said liens and security interests shall have priority over all administration expenses of any kind as provided in 11 U.S.C. §364(c)(1) except the Carve Out, and, pursuant to 11 U.S.C. §364(c), shall be first and prior liens on the aforesaid property, assets and rights of Debtor subject to the Carve Out. Proceeds from the liquidation of any Collateral shall be applied to the Indebtedness and the Post-Petition Loans in such manner and order as Landmark, in its sole discretion, shall elect.

c. Except as specifically modified herein with respect to payment, or under applicable provisions of

the Bankruptcy Code, Debtor shall comply with all terms and provisions of the Loan Documents. Landmark's waiver of the breach of any covenant set forth in the Loan Documents shall not be deemed a waiver of any subsequent defaults or remedies to which Landmark may be entitled.

d. Landmark is hereby granted the right and is authorized to enter upon, occupy and use any or all of the premises of the Debtor as is reasonable upon prior notice to the Debtor, as Landmark may deem necessary or appropriate, in Landmark's sole discretion, in connection with the exercise of any of Landmark's rights and remedies under the Loan Documents and/or the Post-Petition Loan Agreement, including, without limitation, liquidation of the Collateral.

e. Debtor immediately and continuously shall use its best efforts to market for sale as a going concern the outdoor billboard advertising business of the Debtor, and the proceeds from any such sale immediately shall be paid to Landmark at the closing of such sale for application toward reduction of the Indebtedness.

f. Proceeds from all non-ordinary course of business sales of assets of the Debtor immediately shall be paid to Landmark at the closing(s) of such sales for application toward reduction of the Indebtedness.

g. The automatic stay of 11 U.S.C. §362(a) is hereby modified to the extent necessary to permit Landmark to receive all proceeds from asset sales of the Debtor and

apply the same toward reduction of the Indebtedness. Furthermore, the automatic stay is hereby vacated in all respects as to Landmark for the enforcement of Landmark's rights with respect to the creation, perfection and implementation of Landmark's pre-petition and post-petition liens and security interests in the Collateral.

h. At such time as Landmark is entitled to exercise any remedy with respect to one or more items of Collateral, whether as a result of a default by Debtor or otherwise, the Debtor (or a trustee if one shall have been appointed) shall, subject to approval of the Court, at Landmark's request and upon Landmark's prior agreement to allow reasonable expenses of sales to be paid from proceeds of such sales (A) immediately arrange, and diligently pursue to conclusion, a sale or sales, pursuant to 11 U.S.C. §363 free and clear of all liens, claims, encumbrances and interests, of such Collateral designated by Landmark, with Landmark to retain its right to credit bid all or any portion of the Debtor's obligations to Landmark, or (B) immediately transfer (by deed in lieu of foreclosure or other similar conveyance) to Landmark such Collateral designated by Landmark for a credit bid in an amount to be approved by the Court as fair and reasonable. Nothing herein shall limit or impair the Court's authority to rule on the appropriateness of such sale or conveyance.

27. Subject to the terms hereof, Debtor shall sell or dispose of its inventory, products and supplies and shall operate its business only in the ordinary course of business in compliance with the provisions of the Bankruptcy Code

and upon the terms and conditions usual and customary in such business, and shall deposit the proceeds of such operations only in the DIP Accounts.

28. Landmark's authorized representatives shall be given continuous reasonable access at all times to any and all operating personnel, books, records, information and documents of Debtor relating to the operation of Debtor's business and Debtor's financial dealings.

29. Debtor shall furnish or otherwise cause to be furnished to Landmark all such documents and reports as are required by the Loan Documents and the Post-Petition Loan Agreement at such times and in such a manner as are required by the Loan Documents and the Post-Petition Loan Agreement. In addition, the Debtor shall provide Landmark with copies of all schedules and statements of affairs, operating reports, and other financial information, if any, at any time filed in these proceedings by the Debtor.

30. Debtor is authorized and directed to reimburse Landmark promptly for all present and future costs and expenses incurred by Landmark to effectuate the financing transactions as provided in the Loan Documents, the Post-Petition Loan Agreement and/or this Order, including, but not limited to, audit expenses, field examination expenses, title insurance costs, recording costs and fees of Landmark's counsel, all of which costs and expenses are included in the Post-Petition Loans. Landmark shall file with the Clerk of the Bankruptcy Court, the United States Trustee and the Debtor (or a trustee if one is appointed at the time of Landmark's filing) copies of any present and future costs

and expenses submitted to the Debtor pursuant to this paragraph. Such copies need not be in conformance with fee application guidelines imposed on professionals of the estate, but will be subject only to an overall standard of reasonableness. If no objection to the reasonableness of the costs and expenses is filed within 10 days of Landmark's filing, the costs and expenses will be deemed reasonable. In the event of a dispute, the Court will determine the reasonableness of the costs and expenses. No party-in-interest other than the United States Trustee, the Debtor (or a trustee if one has been appointed at the time of Landmark's filing) shall have standing to file such an objection.

31. Notwithstanding anything herein contained to the contrary, this Order shall be without prejudice to Landmark's rights under 11 U.S.C. §§506 and 507 should the adequate protection provided by Debtor hereunder subsequently be found by this Court to have been inadequate.

32. The Debtor does hereby remise, release, acquit and forever discharge Landmark, and all of its officers, directors, agents, employees, affiliates, subsidiaries, successors and assigns, and anyone claiming through or under them or any of them, of and from all manner of action, causes of action, claims and demands of every kind and nature whatsoever, whether known or unknown, from the beginning of time to the date of these presents, that the Debtor had or may now have against Landmark as may have arisen, or has arisen, in connection with any and all matters, including, but not limited to, all matters that were or could have been set forth in connection with the loan relationship between Hen House Interstate, Inc., and Landmark. This release shall not operate

as or be construed to be a release of Landmark for any acts or conduct occurring after the date of this Order.

33. Except for the Carve Out, no expenses of administration of Debtor's Chapter 11 case or any future proceeding which may develop out of such case, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against Landmark or the Collateral, whether pursuant to §506(c) of the Bankruptcy Code or otherwise, without the prior written consent of Landmark, and no such consent shall ever be implied from any other action, inaction or acquiescence by Landmark.

34. In the event Debtor fails to make any payment due under this Order or under the Post-Petition Loan Agreement, Landmark may provide written notice of said non-payment by telecopy, certified mail or hand-delivery to Debtor's counsel. If said payment is not made within two business days after said notice is so provided, the 11 U.S.C. §362(a) automatic stay shall be deemed terminated automatically without further Order of this Court and Landmark shall have all of the rights and remedies otherwise granted to it in this Order and under the Loan Documents and the Post-Petition Loan Agreement and applicable state law, including, without limitation, the rights of set-off, peaceable repossession, foreclosure and contacting Debtor's account debtors to collect receivables. In the event Debtor fails to comply with the terms hereof, other than any payment terms contained in this Order and in the Post-Petition Loan Agreement, Landmark may so advise counsel for Debtor by telecopy, certified mail or hand-delivery and, if the default is not cured within two business days of said notice, may apply to the

Court for a hearing thereon at the earliest practical time and date. In the proceedings on any such application, Debtor shall have the burden of proving that Debtor is in full compliance with the terms of this Order and the Post-Petition Loan Agreement. A ruling by the Court that Debtor has failed to meet its burden of proof on that issue shall result in an immediate termination of the 11 U.S.C. §362(a) automatic stay with respect to Landmark and the Collateral. No party in interest shall have the right to contest the enforcement of this paragraph based on any assertion that Landmark's interests in the Collateral are adequately protected or on any other ground except the non-existence of an alleged default as set forth above, and no party in interest shall have the right to seek injunctive relief under §105 of the Bankruptcy Code inconsistent with the terms of this paragraph. Until all obligations of the Debtor to Landmark shall have been indefeasibly satisfied in full: (i) No party-in-interest other than Landmark shall foreclose or otherwise seek to enforce any lien, junior lien or other rights such other party may have in and to any property of the estate of Debtor upon which Landmark holds or asserts a lien or security interest unless at the same time Landmark is granted relief from the automatic stay to assert its rights in and to such property; and (ii) upon and after the occurrence of any failure by Debtor to comply with any provision of this Order, Landmark, in its sole discretion, in connection with a liquidation of any Collateral may use any real property, equipment, trademarks, trade names, patents or any other assets of Debtor that are owned by or subject to a lien of any third party and that are used by Debtor in its business, provided that Landmark pays reasonable compensation to such third parties.

35. Landmark shall be entitled to the full protection of 11 U.S.C. §364(e) with respect to the debts, obligations, liens and security interests created or authorized in this Order in the event that this Order or any authorization contained herein is vacated, reversed or modified on appeal or otherwise by any court of competent jurisdiction.

36. There shall not at any time be entered in Debtor's Chapter 11 case or any subsequent Chapter 7 case any further order which authorizes: (i) the use of Cash Collateral by Debtor or the sale, lease or other disposition of property of the estate of the Debtor in which Landmark has an interest; or (ii) under 11 U.S.C. §364, the obtaining of credit or the incurring of indebtedness secured by a lien or security interest that is equal or senior to a lien or security interest held by Landmark, or that is entitled to priority administrative status which is equal or superior to that granted to Landmark herein, unless, in each instance: (a) Landmark shall have given its prior written consent thereto, provided that no such consent shall ever be implied from any other action, inaction or acquiescence by Landmark; and (b) such order of this Court requires that there shall first be indefeasibly paid in full to Landmark all obligations of Debtor to Landmark.

37. The security interests and liens granted to Landmark hereunder or otherwise, the obligations of the Debtor to Landmark and the Collateral shall not be altered, modified, extended, discharged, impaired or affected by any plan of reorganization, except upon the prior written consent of Landmark.

38. The Debtor is hereby prohibited from seeking an injunction pursuant to 11 U.S.C. §105, or otherwise, to limit or delay Landmark from realizing upon the Collateral.

39. In determining to make advances to the Debtor under the Post-Petition Loan Agreement or to collect such indebtedness and obligations, Landmark shall not be deemed to be in control of the operations of the Debtor or to be acting as a "responsible person" or an "owner or operator" with respect to the operation or management of the Debtor (as such terms, or any similar terms, are used in the United States Comprehensive Environmental Response, Compensation and Liability Act, as amended, the Internal Revenue Code, as amended, or any other Federal or state statute).

40. The Reconsideration Motion is hereby granted and all objections to the Emergency Order that are inconsistent with the relief requested in the Reconsideration Motion are hereby overruled.

41. If an order is entered at any time that terminates or modifies in any way the provisions of this Order, then Landmark shall have no further obligations to the Debtor whatsoever and the Indebtedness, the Post-Petition Loans and all other obligations of the Debtor to Landmark immediately shall be due and payable.

42. The rights and liens granted and adjudications made herein as to Landmark, and the obligations and duties of the Debtor herein, shall be binding and valid against the Debtor, all creditors and parties-in-interest in this proceeding and any successor(s) of Debtor, including any Chapter 7 trustee

appointed in the present or any subsequent proceedings under the Bankruptcy Code, and shall survive the termination, modification or expiration of this Order, or any termination of the present proceedings, whether by confirmation of a plan, dismissal, conversion or otherwise. Landmark shall not be required to take any further actions or make any filings to perfect said rights and liens. If, however, Landmark shall, in its sole discretion, elect for any reason to file any financing statements, mortgages, deeds of trust or other documents with respect to such security interests and liens, the Debtor promptly shall execute same upon Landmark's request and all such financing statements, mortgages, deeds of trust and other documents shall be deemed to have been filed or recorded at the time and on the date of commencement of this Chapter 11 case. Landmark may, in its sole discretion, file a certified copy of this Order in any filing or recording office in any county or other jurisdiction in which the Debtor has real or personal property and, in such event, the subject filing or recording officer is authorized and directed to file or record such certified copy of this Order.

43. This Order may be extended from time to tine without further hearing, upon written agreement of Debtor and Landmark and upon notice to the Court and to those parties as the Court may designate from time to time.

DATED: October 25, 1991

s/ David P. McDonald
UNITED STATES BANKRUPTCY
JUDGE

Final Order to Obtain Post-Petition Secured Credit

APPROVED AS TO FORM AND SUBSTANCE:

HEN HOUSE INTERSTATE, INC.
Debtor and
Debtor-in-Possession

By s/ David A. Warfield
David A. Warfield
Husch & Eppenberger
100 North Broadway
St. Louis, Missouri 63102
(314) 421-4800

Its Attorneys

LANDMARK BANK OF ILLINOIS

By s/ Carl J. Spector
Carl J. Spector
Karen W. Fries
Bryan, Cave, McPheeters & McRoberts
500 N. Broadway,
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St. Louis, Missouri 63102
(314) 231-8600

Its Attorneys

APPLICATION FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE, PURSUANT TO 11 U.S.C. § 503 AND CHARGE AGAINST COLLATERAL, PURSUANT TO 11 U.S.C. § 506(c) DATED AUGUST 2, 1993

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 91-45623-293
Chapter 7 Proceeding

IN RE:

HEN HOUSE INTERSTATE, INC.,

Debtor.

APPLICATION FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE PURSUANT TO 11 U.S.C. SECTION 503 AND CHARGE AGAINST COLLATERAL PURSUANT TO 11 U.S.C. SECTION 506(C)

Hearing Date: August 26, 1993
Hearing Time: 10 a.m.

COMES NOW Hartford Underwriters Insurance Company ("Hartford") by and through its attorneys, Vincent D. Vogler & Associates, and for its Application for Allowance of Administrative Expense Claim and Charge against Collateral, respectfully states to the Court as follows:

1. On September 5, 1991, Hen House Interstate, Inc. ("Debtor"), filed a voluntary Petition for relief under Chapter 11 of the United States Bankruptcy Code (the "Code").

2. At the commencement of the case, the debtor obtained workman's compensation coverage issued by Hartford.

3. The final Order authorizing Debtor to obtain post-petition secured creditor, granting senior liens and administrative priority expense, modifying automatic stay, providing adequate protection and authorizing agreements with Landmark Bank of Illinois entered on or about October 22, 1991, clearly contemplated the continuation of the Debtor's business and the need for the Debtor to maintain workman's compensation coverage.

4. During the course of the administration of this Estate, Hartford continued to provide workman's compensation insurance, for which the Debtor-in-Possession agreed to pay all accrued premiums.

5. At the conclusion of the policy period, Hartford conducted a final audit of the Debtor's insurance policy, and pursuant to said audit, the sum of $53,339.00 remains due and owing to Hartford.

6. No part of said $53,339.00 has been paid by Debtor, and the sum remains due and owing.

7. Hartford further argues that said administrative expense is recoverable from property securing the claim of Magna Bank pursuant to 11 U.S.C. Section 506(c) on the

basis that a continuation of worker's compensation coverage was required in order to keep the Debtor's restaurants open and operating, which allowed them to be sold as going concerns and enabled Magna Bank to maximize the value of their collateral.

WHEREFORE, the undersigned prays that it be allowed an administrative expense claim in the sum of $53,339.00; that said administrative expense claim is recoverable from property securing the claim of Magna Bank pursuant to 11 U.S.C. Section 506(c); and for such other and further relief as the Court deems just and proper.

VINCENT D. VOGLER AND
ASSOCIATES

By:_____

WENDI S. ALPER
(M.B.E. #32906)
Attorney for Hartford Underwriters
Insurance Company
11330 Olive Blvd., Suite 200
P.O. Box 419037
St. Louis, MO 63141-9037
(314) 567-7970

Application for Allowance of Administrative Expense

ITT HARTFORD

Hen House Interstate Inc
P.O. Box 1014
Saint Charles, MO 63302-1014

ITT Hartford
P.O. Box 2024
Hartford, CT 06145

Statement of Premiums

Date: *7/21/93*

Account #: *MOIL1080000MKZ*

Agent/Broker *Cervantes & Assoc.*

Total Amt Due *$53,339.00*

Policy	Policy Period	Transaction	Effective Date	Premium
83 AN8711	09/01/91-09/01/92	New Business	09/01/91	$25,820.00
		Transfer	10/02/91	(34,297.00)
		A/P Endorse	11/11/91	6,139.00
		Interim Audit	09/01/91	32,418.00
		Interim Audit	09/01/91	17,760.00
		Interim Audit	01/01/91	11,882.00
		Interim Audit	02/01/91	11,882.00
		Interim Audit	01/01/92	1,373.00
		Interim Audit	02/01/92	10,682.00
		Interim Audit	03/01/92	12,178.00
		Interim Audit	03/01/92	0.00
		Payment	06/22/92	(47,997.00)
		Transfer	06/24/92	157.00
		Total Due on Policy Term:		Continued

Application for Allowance of Administrative Expense

ITT HARTFORD

Hen House Interstate Inc
P.O. Box 1014
Saint Charles, MO 63302-1014

ITT Hartford
P.O. Box 2024
Hartford, CT 06145

Statement of Premiums

Date: *7/21/93*

Account #: *MOIL1080000MKZ*

Agent/Broker *Cervantes & Assoc.*

Total Amt Due *$53,339.00*

Policy	Policy Period	Transaction	Effective Date	Premium
83 AN8711	09/01/91-09/01/92	Interim Audit	05/01/92	$13,344.00
		Interim Audit	05/01/92	12,194.00
		Transfer	06/24/92	(157.00)
		Interim Audit	07/01/92	12,194.00
		Interim Audit	07/01/92	(12,194.00)
		Interim Audit	07/01/92	11,005.00
		Final Audit	09/01/91	(31,044.00)
		Total Due on Policy Term:		$53,339.00

OBJECTION OF MAGNA BANK OF ILLINOIS TO HARTFORD UNDERWRITERS INSURANCE COMPANY APPLICATION FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE PURSUANT TO 11 U.S.C. § 503 AND CHARGE AGAINST COLLATERAL PURSUANT TO 11 U.S.C. § 506(c) DATED AND FILED AUGUST 20, 1993

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Proceedings Under Chapter 7

Case No. 91-45623-293

In Re:

HEN HOUSE INTERSTATE, INC.,

Debtor.

OBJECTION OF MAGNA BANK OF ILLINOIS TO HARTFORD UNDERWRITERS INSURANCE COMPANY APPLICATION FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE PURSUANT TO 11 U.S.C. SECTION 503 AND CHARGE AGAINST COLLATERAL PURSUANT TO 11 U.S.C. SECTION 506(c)

Hearing Date: August 26, 1993
Hearing Time: 10:00 a.m.

Objection to Application for Administrative Expense

Comes now Magna Bank of Illinois (successor-in-interest to Landmark Bank of Illinois) ("Magna"), and for its objection to the Application for Allowance of Administrative Expense Pursuant to 11 U.S.C. Section 503 and Charge Against Collateral Pursuant to 11 U.S.C. Section 506(c) (the "Application") filed by Hartford Underwriters Insurance Company ("Hartford") states as follows:

1. Paragraph 33 of the *Final Order Authorizing Debtor to Obtain Post-Petition Secured Credit, Granting Senior Liens and Administrative Priority Expense, Modifying Automatic Stay, Providing Adequate Protection and Authorizing Agreements with Landmark Bank of Illinois* (the "Final Order") entered by the Court in this case on or about October 25, 1991, states as follows:

> "Except for the Carve Out, no expenses of administration of Debtor's Chapter 11 case or any future proceeding which may develop out of such case, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against Landmark or the Collateral, whether pursuant to §506(c) of the Bankruptcy Code or otherwise, without the prior written consent of Landmark, and no such consent shall ever be implied from any other action, inaction or acquiescence by Landmark."

At no time did Magna (or Landmark) execute a "prior written consent" to allow the alleged administrative expense of Hartford to be charged against Magna or its collateral. Accordingly, paragraph 33 of the Final Order expressly

prohibits the relief requested by Hartford with respect to section 506(c).

2. Even in the absence of paragraph 33 of the Final Order, Hartford has failed to establish that it is entitled to the relief it is requesting under Section 506(c). See *Brookfield Production Credit Association v. Borron*, 738 F.2d 951 (8th Cir. 1984).

3. Hartford lacks standing to seek the relief under Section 506(c) requested in the Hartford Application. See *In re Codesco, Inc.*, 18 B.R. 225 (Bankr. S.D.N.Y. 1982).

WHEREFORE, Magna respectfully requests that the Court deny the Application and for such other and further relief as is just and proper.

BRYAN CAVE

By: s/ Carl J. Spector
Carl J. Spector, Esq.
One Metropolitan Square
211 North Broadway, Suite 3600
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TRIAL STIPULATION OF FACTS DATED AND FILED APRIL 5, 1994

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Proceedings Under Chapter 7

Case No. 91-45623-293

In Re:

HEN HOUSE INTERSTATE INC.,

Debtor.

HARTFORD UNDERWRITERS
INSURANCE COMPANY,

Movant,

vs.

MAGNA BANK OF ILLINOIS,

Respondent.

Motion No. 463

Hearing Date: April 5, 1994
Hearing Time: 9:30 a.m.

TRIAL STIPULATION OF FACTS

Hartford Underwriters Insurance Company ("Hartford") and Magna Bank of Illinois ("Magna")[1] stipulate to the following facts for purposes of the trial on this matter:

1. Hen House Interstate, Inc. (the "Debtor"), filed Chapter 11 proceedings on September 5, 1991.

2. Hartford provided worker's compensation insurance coverage (the "Insurance") for the Debtor for the period from September 1, 1991, through September 1, 1992. The Debtor was required to carry Insurance during that period.

3. The Debtor previously paid premiums totalling $82,294.00 to Hartford on account of the Insurance.

4. Hartford claims that it still is owed $51,871.40 for Insurance premiums for the post-petition period during which the Insurance was in force. Magna has no evidence to the contrary with respect to the amount claimed to be outstanding.

5. As of the present time, Hartford has paid losses on worker's compensation claims made under the Insurance totalling $32,551.00. In addition, Hartford presently has reserved, but has not paid, $38,549.00 on account of potential losses. As of August of 1993, the amount held in reserve on

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1. For convenience, reference is made to "Magna" throughout this Stipulation, notwithstanding that certain facts pertain to Landmark Bank of Illinois prior to its acquisition by Magna.

account of potential losses was $20,821.00. The total amount of losses actually paid by Hartford under the Insurance increased by $179.00 from August of 1993 to the present. No new claims have been made on the Insurance since September of 1992.

6. In making the post-petition debtor-in-possession loan to the Debtor, Magna anticipated that it, as well as the Debtor's other creditors, would receive a greater return through a Chapter 11 filing in which the Debtor's operations would continue in the hope of a reorganization, rather than from an immediate liquidation of the Debtor's property outside of Chapter 11.

7. When the Debtor filed Chapter 11 on September 5, 1991, the Debtor anticipated that it would continue its operations and reorganize its business. Sometime in 1992, the reorganization prospects did not materialize and the Debtor liquidated its assets through a combination of going concern sales and sales of shut-down properties.

8. As of the September 5, 1991, petition date, the Debtor owed Magna approximately $4 million.

9. Magna has not recovered the full amount owed to it by the Debtor. Magna has lost approximately $1,500,000.00 in principal, plus additional amounts for unpaid interest and attorneys' fees and expenses.

10. Magna previously disbursed to the Debtor the full $300,000.00 available under the post-petition debtor-in-possession loan made by Magna to the Debtor.

Trial Stipulation of Facts

11. Hartford was not aware of the Debtor's bankruptcy proceedings until March of 1993.

Dated: April 5, 1994

VINCENT D. VOGLER & ASSOCIATES	BRYAN CAVE
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TRANSCRIPT OF HEARING OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION BEFORE THE HONORABLE DAVID P. MC DONALD DATED APRIL 5, 1994

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 91-45623-293
Chapter 7
St. Louis, Missouri
April 5, 1994
10:40 O'clock A.M.

In The Matter of:

HEN HOUSE INTERSTATE, INC.,

Debtor.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE DAVID P. McDONALD

* * *

[2] PROCEEDINGS

THE COURT: Hen House Interstate. Hartford Underwriters. Ms. Alper, do you represent Hartford?

MS. ALPER: Yes, Your Honor.

THE COURT: Okay.

MS. ALPER: I believe — I'm ready. Carl? I believe Mr. Spector has a stipulation of facts for the trial, which has been executed by us both.

THE COURT: All right.

MR. SPECTOR: Your Honor, what I have and would like to tender to the Court is the trial stipulation of facts, which we have filed with the Clerk's office and is file-stamped, as well as four exhibits that have been marked Joint Trial Exhibits 1, 2, 3 and 4. Just for the record, let me identify what these Joint Trial Exhibits are. Joint Trial Exhibit 1 is a certified copy of the emergency motion for order authorizing debtor to obtain post-petition financing pursuant to 11 U.S.C. §364, to utilize cash collateral pursuant to 11 U.S.C. §363, and granting adequate protection to pre-petition secured party, that was filed in this case. Joint Trial Exhibit 2 is the emergency order entered by this Court on September 6th, 1991 authorizing the financing on an emergency basis. This is also a certified copy. Joint Trial Exhibit 3 is the final order entered by the Court on October 25th, 1991 authorizing the financing. This is also a [3] certified copy. And then Joint Trial Exhibit 4 is the deposition of —

MS. ALPER: Mary Zuk.

MR. SPECTOR: — Hartford Underwriters Insurance Company, which designated as its representative, Mary Zuk, Z-u-k, to testify on its behalf. This exhibit not only includes the transcript of her deposition, but also the exhibits that

were introduced at her deposition. If I may, I'd like to tender these to the Court at this time.

THE COURT: Thank you.

MR. SPECTOR: Also, Judge, in addition to the exhibits that are — well, let me formally move on behalf of both parties that Exhibits 1 through 4 be admitted into evidence.

THE COURT: They'll be received as marked along with the Trial Stipulation of Facts.

MR. SPECTOR: All right, Judge. Thank you. Also there are specific portions of the deposition transcript that I would like to read into the record and draw the Court's attention to. Beyond that, there is no presentation of evidence, unless Ms. Alper has anything else. And then we're both prepared to present our arguments.

THE COURT: Go right ahead.

MR. SPECTOR: Judge, I realize we've sort of blown right into the evidence and portions of testimony. Would it [4] be of any help to refresh the Court's recollection of what the issues are here? Or are you fully familiar with them?

THE COURT: I read through my own decision that I had written earlier and I reviewed the few things that were in the file. But feel free, if you feel you need to bring me up to date, go ahead.

MR. SPECTOR: Okay. Judge, as you obviously recall, then, from your prior decision, there is approximately actually a little over $51,000 now that's been in dispute. Hartford has revised that figure somewhat lower to account for a pre-petition period that should not be included in the post-petition claim. And that is reflected in the Trial Stipulation of Facts. The claim is for Workers' Compensation premiums, which Hartford says remains unpaid. We have no evidence to the contrary and didn't see any reason to require Ms. Alper to bring in testimony in order to prove that up. We would have no evidence to the contrary. As you know, the 8th Circuit has held that administrative claimants can have standing if the equities of the case dictate that they should have standing under §506(c). Our position is that they should not. We articulated that to the Court before based on the statutory language of 506(c). We recognize we can't argue before you today to change that law as to whether or not administrative claimants may have standing if the equities of the case so dictate. And we're not going to [5] attempt to reargue that here. There are, however, other arguments that I will speak to in greater detail, but just — after I've presented the deposition testimony. But just so that you understand where we're headed, there really are essentially the following arguments, notwithstanding the Boatmen's decision that the 8th Circuit made. Number one, is that §364(e) of the Bankruptcy Code protects the final order that was entered by the Court from being modified in any fashion or being ignored or tinkered with in any manner. And as Your Honor may recall, there is a provision in that final order expressly prohibiting the charge of 506 claims against Magna's collateral, absent it's prior written consent.

THE COURT: Well, did the same thing exist in the 8th Circuit case?

MR. SPECTOR: No, it did not —

THE COURT: Okay.

MR. SPECTOR: — Judge, and I think that is a significant point and one which I intend to address specifically in the argument section. We also believe that the equities of the case are such that Hartford should not be allowed to charge its premiums under 506(c) to Magna's collateral. And as you will see, it is primarily because Hartford has collected in premiums substantially more than it has paid in any losses on the policy. Magna itself has lost in excess of a million five. And Hartford has not handled [6] this policy in accordance with its own guidelines and internal regulations and, in effect, sat on its rights. And also, Judge, frankly, because Hartford maintains that it was not aware of the bankruptcy proceedings, it really could not in any way have relied on rights under 506(c) in extending the unsecured credit to the debtor. I will also argue in greater detail in the argument section that the standard that the 8th Circuit has had for approximately ten years before the Boatmen's case was decided, on whether or not you can recover under §506(c) remains alive. There's a very narrow exception that had been applied under the 8th Circuit's case in the Brookfield (phonetic) Production Credit Association vs. Boron (phonetic) case that has been the law for ten years. The case wasn't even mentioned in the Boatmen's case and I believe for certain reasons, as I'll enunciate, that that standard still remains alive. And as a result should not, in

application of that standard Hartford will not be able to recover. So those are the arguments that I will be making. And with that background, I would like to read into the record certain portions of the transcript of the deposition of Mary Zuk, which was the designated representative of Hartford Underwriters.

THE COURT: Okay.

MR. SPECTOR: Judge, do you have that deposition?

THE COURT: I have it before me.

[7] MR. SPECTOR: All right. Your Honor, beginning on page 36, line 3 of the deposition the question was as follows:

"Q Now, when we look back on page 3" — which, by the way, refer to the interrogatory answers that are Exhibit 1 to the deposition — "Now, when we look back on page 3 and refer back to the due dates of October 15th of 1991, November 15th of 1991, December 15th of 1991 and January 16th of 1992, can you tell me whether the policy could have been cancelled for nonpayment on any of those dates?

"A I would say yes, it could.

"Q But that was not done by Hartford, was it?

"A No.

"Q Do you or do you not know why?

"A No, I don't know why. I was going to say not to my knowledge, but the answer is I don't know.

"Q In your experience at Hartford is it generally the policy to send a cancellation notice for nonpayment and cancel a policy if the payment is not timely received?

"A That is the policy as I know it, yes.

"Q And to your knowledge, is that the policy that is supposed to be followed by individuals at Hartford?

"A I mean, that would be — my general answer would be yes, but I don't know what specific circumstances there might be.

"Q And in this particular case, from the information that [8] you have, is it your testimony that the policy was not followed?

"A It appears that it was not followed."

Your Honor, I would also like to read into the record the testimony on page 40 of Ms. Zuk's deposition beginning on line 2.

"Q And based on your answer to Interrogatory No. 6, is it correct that you did not receive a payment at all from Hen House until June 22nd of 1992?

"A Yes.

Transcript of Hearing

"Q And the policy had been in force since September 1 of 1991, is that correct?

"A Yes.

"Q And at the same time there were monthly payments that you were suppose to receive from Hen House, correct?

"A Correct.

"Q And under the Hartford guidelines that you were supposed to follow, each nonpayment on each month from September 1, 1991 through June 15 of 1992 would have been grounds for cancellation, correct?

"A Yes.

"A Yes.

"Q And yet Hartford never cancelled the policy during any of that period of time, correct?

"A Correct.

"Q And you don't know why it wasn't cancelled?

[9] "A No.

"Q If it had been cancelled for nonpayment, would Hartford's losses be less than what you're claiming in this case?

"A certainly from a premium standpoint, yes.

Transcript of Hearing

"Q You would be claiming less than fifty-three thousand-plus dollars, correct?

"A Depending on what point at which it was cancelled, yes.

"Q The earlier it was cancelled the less money you would be claiming, correct?

"A Correct.

"Q So that if Hartford had followed its policies of cancelling for nonpayment as early as October of 1991, your claim here would be significantly less, wouldn't it?

"A Yes."

Next, Your Honor, page 57 beginning on line 11 of Ms. Zuk's deposition.

"Q The assigned risk pool is known as the market of last resort for this type of insurance, isn't that correct?

"A Right.

"Q And Hartford would have been aware when it received this policy that it was a company that could not get the insurance elsewhere, correct?

"A Correct.

"Q Do you also agree that that indicates to Hartford that the insured is a greater credit risk than those who can [10] obtain insurance through the voluntary market?

"A That would be the natural assumption. Whether that's actually true or not, I don't know. Yes, I would assume that.

"Q That's why somebody is in the market of last resort, right?

"A Yes. The same reason for the assigned risk billing.

"Q So Hartford was on notice as of September of 1991, when it first took in the policy, that the insured was a higher credit risk than those who do not obtain the insurance through the market of last resort, correct?

"A Correct.

"Q And yet it kept the insurance in force for more than nine months without having any payments to be applied to the outstanding balance, is that correct?

"A Yes, that appears to be correct.

"Q Does that sound like normal procedure to you?

"A I hope not. I don't know."

A very short passage, Judge, on page 72 beginning on line 14.

"Q In searching your files, have you seen any invoices sent to Hen House prior to May 27th of 1992?

"A No."

And Your Honor will recall this policy actually went into effect in September of 1991. Two more passages, Judge, and then I will be completed. Page 87 beginning on line 19. I [11] had identified or marked for identification. Exhibit 11, which was out of the manual from the assigned risk pool entity known as NCCI.

"Q Let me show you Exhibit 11 and ask you to tell me what that is, please.

"A These are the collection procedures from the NCCI manual.

"Q Do those procedures apply to Hartford?

"A Yes.

"Q Do those procedures apply to this Hen House insurance that's at issue here?

"A Yes, it should.

"Q Should these procedures also apply to the assigned risk department at Hartford?

"A Yes.

"Q I'd like you to read the first complete sentence at the top of the second page. If you would read it aloud, please.

"A 'If undisputed premium remains unpaid cancellation procedures should be initiated consistent with the cancellation performance standards found in §A-4.'

"Q And these are guidelines required by NCCI, correct?

"A Right.

"Q Was that guideline followed in this case?

"A You mean before it got to collections?

"Q At any time.

"A No, they were not followed all the time.

[12] "Q Do you know why they were not followed?

"A No."

And then finally, Judge, on page 90 beginning on line 22.

"Q Ultimately, if you don't recover the $53,000, who is going to sustain the loss? Is it Hartford or NCCI?

"A It would be at this time and in this instance it would be NCCI."

And that's the end of the particular portions that I intended to read into the record, Judge.

THE COURT: All right. Thank you. Ms. Alper, was there any portion of this that you wished to read into the record?

MS. ALPER: Just a few, Judge. Beginning on page 94, line 23.

"Q With respect to the assigned risk pool as being the insurer of last resort, is a credit risk the only reason a company would be in the pool.

"A No. Many times it's also their claims history.

"Q Thus Hen House being in the pool would not necessarily mean that they were a credit risk?

"A Right. Right. And I think they had an experience mod that was like 1.88 that shows they had a high experience mod that shows they did they did have a bad claims history."

And turning to page 42, line 2.

"Q Now, in your response to the Interrogatory No. 6 also [13] state that on June 29th, 1992 the account appeared on a nonpayment cancellation list, is that correct?

"A Yes.

"Q And that is seven days after receiving the forty-seven thousand nine-ninety-seven, correct?

"A Right.

"Q I take it then that Hartford had already known about the payment of the forty-seven thousand-plus dollars when the account appeared on the nonpayment cancellation list, correct?

"A Yes. Yes.

"Q Why was the policy not cancelled after it appeared on the June 29th, 1992 nonpayment cancellation list?

"A Well, in my file there's a memo that says, 'Too late to process. Cancellation expires 9/1/92.' "

And beginning on page 72, line 10.

"Q To your knowledge, were there invoices of this type sent prior to May 27th, 1992 to Hen House?

"A Not to my knowledge, no.

"Q In searching your files, have you seen any invoices sent to Hen House prior to May 27th, 1992?

"A No.

"Q Why would there not have been invoices sent on a policy that commenced in September of 1991 until May 27th, 1992?

"A I think that was because Hen House did not send in those [14] monthly interim audits for all those months.

"Q So long as someone doesn't send an interim audit, they don't have to pay?

"A Well, we wouldn't know how much to charge until" — excuse me — "would not know how much to charge them until finally the auditor went in and did a physical audit. I believe that was in February.

"Q Why didn't the auditor do a physical audit sooner when the reports weren't received?

"A I'm sure that would be a matter of scheduling or I don't know what the work load is. I don't know the answer to that."

That's all, Judge.

THE COURT: All right, thank you. Any rebuttal reading of the deposition?

MR. SPECTOR: No, Your Honor.

THE COURT: All right. I assume now you both simply wish to give an argument?

MS. ALPER: Yes.

THE COURT: Mr. Spector?

MR. SPECTOR: Yes, Judge. I was going to say I suspect it makes more sense for me to articulate my arguments, but I'll defer to Ms. Alper.

MS. ALPER: No, that's fine. You go first.

MR. SPECTOR: Judge, what I will leave with the [15] Court so that you don't have to try and memorize everything that I'm trying to articulate here is number one, a summary of the arguments that I am presenting today. It is not a very long document. But I thought in summary outline fashion it would be more helpful than a long memorandum. What I

also did in addition to that is prepare a separate memorandum of law addressing the 364 issue in particular because I think that is something that requires consideration of case law and warranted a short legal memorandum on the issue. As I stated earlier, we are not asking this Court to decide this case on the grounds that Hartford cannot have standing under §506(c). We concede that that's the 8th Circuit law as it stands and can't be changed by this Court. Our first argument, Judge, is that §364(e) of the Bankruptcy Code in the financing section prohibits this Court from modifying or ignoring or otherwise changing the terms of the financing order that was entered by this Court upon proper notice in compliance with the Bankruptcy Code, in compliance with the Bankruptcy Rules and on which Magna relied in extending $300,000 in new post-petition credit, as well as allowing the authorization to use cash collateral during the case. Paragraph 33 of this Court's final order, which was entered on October 25th of 1991, contained a specific provision that provided that, except for a carve-out, which was $10,000 for professional fees, no expenses of administration of the debtor's Chapter [16] 11 case or any future proceeding shall be charged against Magna or the collateral, whether pursuant to 506(c) or otherwise, absent the prior written consent of Magna. And I should note for the record that when I refer to Magna, that includes any references to Landmark, since Landmark was actually the predecessor in interest to Magna's present day position. So we have a paragraph in the final order which expressly prohibits the type of relief that Hartford is requesting here. As the Court knows, there's a very strong policy of encouraging post-petition financing. That's the reason for §364(e) is because a lender has to know that the promises that are made

and the orders entered won't be tinkered with at some point later on in the case. I think that the 7th Circuit in the Common Nates (phonetic) decision, which is cited in our memorandum, articulated it very well. And the Court said the following,

> "The lender that extends credit in reliance on a financing order is entitled to the benefit of that order, even if it turns out to be legally or factually erroneous. If a creditor fears the rug will be pulled out from under them, they will hesitate to lend. And 364(e) prohibits courts from backtracking on promises in the absence of bad faith."

I should note bad faith is not an issue here. There was a [17] finding of bad — a finding of good faith by all the parties to the financing order. And that's not something that's been raised by Hartford and is not an issue in the case. The question then comes up, what, if any, is the impact of the recent 8th Circuit case, the Boatmen's — IRS vs. Boatmen's case construing 506(c)? And I don't believe that that case (A) even addresses 364(e) or would compel this Court to not follow the requirements of 364(e) for some critical reasons. Number one, in the 8th Circuit's Boatmen's case the lender in that case expressly subordinated its liens to all administrative claims. Here we have just the opposite. We have a super-priority lien. If you look at the order, it is replete to make sure we took great pains to insure that we had the first priority lien and that there would be no 506(c) charges, unless there was express consent in writing to a 506(c) charge. So I think that the facts of the Boatmen's case are so different because of the express consent to a subordination of its lien, as opposed to here where there was an express

prohibition that 364(e) and the strong policy that it has behind it remains alive and certainly applies to this case. And the relief that Hartford is asking for is that, in effect, you modify that order or you look past that order. The one reason that they've articulated in they said, "Well, we didn't have notice of the bankruptcy proceedings." Well, number one, under 364, even if there is a modification or [18] tinkering with the order, the strong policy behind 364(e) is even if it's modified as the Common Nate Court said, even if factually or legally erroneous, that doesn't change the viability of the order itself. It still remains intact. The second point is that if they didn't know about the bankruptcy proceedings, they certainly couldn't have relied on any rights that they thought they may have had under 506(c). In effect, after the fact they say, "Oh, we hadn't billed this thing till May 27th. We didn't cancel when we had the right. We're still owed money. Ah, but I see there's this section called 506(c). I'm going to see if I can get paid under that section." I don't think there's any prejudice, in any event, to the application of 364(e) because if they had no notice of the proceedings they certainly couldn't have relied in any sense on rights they thought they might have had under 506(c). Secondly, Judge, we believe the equities in this particular case, even consistent with the Boatmen's decision by the 8th Circuit suggests that this creditor should not be awarded any charges under §506(c). You will see in the stipulation of facts that Hartford to-date has paid approximately $32,000 actual out of pocket $32,000 to claimants. At the same time it has collected from Hen House in excess of $82,000 in premium payments that were, in fact, paid. So as we stand here today, Hartford's already collected approximately $50,000 more in premiums than it's [19] had to pay in losses. And as you know, insurers also

like to create reserves for claims that are still open. There is approximately another $38,000, that is reflected again in the Trial Stipulation of Facts, that Hartford has reserved, but not paid for claims. Even if you total what they have actually paid and assume everything that they have presently reserved to-date gets paid, they will still have received $11,000 more in premium payments that have, in fact, been paid than what they've had to pay out on claims. Now, Ms. Alper will tell you that the policy period is still open and there are potentially increased claims. You will see, however, that the stipulation states that there have been no new claims asserted in a year and a half. The last claim asserted was September of 1992, which was when the policy concluded. And number two, that the only thing that has changed, for example, from August of 1993 to the present is that Hartford paid out an additional $179 in claims and increased its reserve by some amount during that period. But effectively the amounts actually paid haven't changed over a long period of time and they have increased their reserves to some extent. But even with the increase in reserves, if all of those, which is the adjustor's best guess at this juncture, if all of those are paid, coupled with what they have paid, they would still have received $11,000 more in premium payments. At the same time Magna in this case, which [20] came forward with the financing and provided it, provided the use of the case collateral, has lost in excess of a million five in the case. Also, Judge, as you have, I think, amply seen from the testimony of the deposition that was read into the record, Hartford was extremely delinquent, by its own admission, in pursuing collections. It failed to follow its own internal policies. It failed to follow guidelines that the NCCI had established and which bound Hartford. And so, in effect,

this is someone who has sat on their rights from a policy in 1991 and is here in 1994 seeking to charge us with these unpaid premiums. They admit by — again, by their own testimony, that had they acted timely and had they taken the appropriate steps, their claim would have been diminished significantly, by following their own procedures, which they chose not to do. The fact that Hartford claims that it did not have notice of the bankruptcy proceedings, again, actually weighs in Magna's favor on the equities issue. Because if it's someone who didn't know about the proceedings and didn't in any way rely on assumed rights under 506(c), it hardly seems inequitable to say that given all these other factors and the fact that this isn't something that you were consciously aiming for and trying to accomplish, that under the equities we should not allow the claim to be charged under 506(c). Now, the last argument that I would like to assert is that the 8th Circuit's decision ten years ago in [21] the Brookfield Production Credit Association vs. Boron case, which announced a very narrow standard for charging 506(c) claims against secured creditors, remains alive, notwithstanding the existence of this new 8th Circuit Boatmen's case. The Boatmen's case does not even mention this longstanding ten year old case that has been the policy in this district for ten years. Does not even mention this Boron case whatsoever. What can you gather from that? I think that the most logical conclusion that you can gather from that is that the Court didn't intend to overrule the Boron case because if they did, all you'd have to do is type in 506(c) into the computer, up pops the Boron case. It's an 8th Circuit case. I would find it hard to believe that the Court wouldn't have mentioned the decision and said, "We overrule Boron and now adopt this now standard." So I think that the standard

still applies. So the question then is, under what circumstances do you apply the test in Boatmen's and under what circumstances do you apply the test in Boron? Here are the factors that I think in the Boatmen's case were present that were so significant to the broad standard that was applied in the Boatmen's case. And when I speak about the broad standard, I will say that I believe, as that case is written, there virtually is no administrative expense that wouldn't be charged under 506(c). I really think — and I will state for the record, I think that standard is wrong [22] under any set of circumstances, frankly, because what happened is that now the exception has swallowed the 506(a) rule of not charging secured creditors except in unique circumstances. But I'm not asking you to change the 8th Circuit standard in its entirety. In the Boatmen's case these were the unique circumstances that I think led the Court to adopt this broad, sweeping standard that it did. Number one, as I mentioned before, the lender in Boatmen's expressly subordinated its security interest to legitimate administrative claims. That's factor number one. That was not the case here, obviously, as we've discussed. Secondly, the initial purpose at the inception of the case in the Boatmen's decision was to lend the funds only to conduct an immediate liquidation of the debtor's assets solely for the benefit of the secured creditor. That's why the case was filed. That's why the funds were lent. And frankly, that's why I assume the lender in that case expressly subordinated its liens to administrative claimants. Here, however, the purpose of the loan, as reflected in the stipulation and as reflected in the debtor's motion and as reflected in the findings of the Court in the financing orders, was to give the debtor an opportunity to reorganize and to pay all creditors a better return. Certainly one doesn't lend

funds or go into a bankruptcy in the hopes of getting a worse return. But the purpose was really to allow the debtor the [23] opportunity to reorganize for the benefit of all creditors. It wasn't, as the Court will recall and the documents reflect, a filing to begin an immediate liquidation limited solely to the assets of the bank in order to maximize the value. Ultimately, after there were several efforts, as the Court knows, by the debtor to reorganize, there was a liquidation. And that did ultimately occur in the case. But that wasn't the purpose of the loan when it was made and that's a significant distinction from what occurred in the 8th Circuit's decision where that was the purpose at the inception of the financing. Thirdly, I think it is significant that in the Boatmen's case the 506(c) claimant was an involuntary administrative claimant. It was the IRS. And the decision it relied on, the Annette Ford (phonetic) decision, was an admin — an involuntary administrative claimant, someone who has no choice of whether to participate in the proceedings or not. Here you have an administrative claimant who can choose to do business in the State of Missouri or not to do business in the State of Missouri. I think Ms. Alper will tell you that Hartford doesn't know when it is assigned Workers' Compensation policies until after the fact because it goes to the — this NCCI entity in the first place. But again, it's somebody who can choose or not choose to do business in a state that is subject to those requirements. The government, the IRS, has no choice. It [24] can't say that we're going to allow this person to be an administrative debtor or not. They simply are thrown into the process and I think that that is significant. So for those three key reasons, the fact that there was an express subordination, the fact that at the inception the only purpose of the 11 was to liquidate for the bank's

benefit, and the fact that it was an administrative involuntary creditor, I think should require that the Boatmen's case be limited to facts that have those circumstances present. If those circumstances aren't present, if none of them are present, then I think we still have the Boron Farm standard, the one that's been around for ten years and not mentioned in the Boatmen's case. That standard, as the Court will recall, is a much more narrow specific standard where you have to show the expenditure was primarily for the benefit of the secured creditor, that it was — even it there's an indirect benefit to the secured creditor, for example, by the fact that Workers' Compensation insurance existed, even if there was an indirect benefit, that's not enough to charge under 506(c). You have to have something that is a — is directly and immediately identified for — specifically for that secured creditor as opposed to something that benefits the estate generally. Magna, obviously, did not have a lien on the workers. An expenditure of funds for Workers' Compensation would not be done primarily just to benefit [25] Magna. It is a requirement that the debtor has just in order to operate its estate and operates for the benefit of all creditors. And so I think that the Boron standard still exists and I think when you apply it to this case, Hartford doesn't satisfy it. Would Hartford satisfy if the Boatmen's standard applies? I think so because I don't know what doesn't apply under the Boatmen's standard. But I don't think the Boatmen's standard applies. Judge, those are the separate independent reasons why we think that the Hartford application should be denied and what I would like to do is at this time tender to the Court both the summary of our arguments that I've prepared as well as our legal memorandum on the 364(e) issue.

THE COURT: All right. Thank you.

MR. SPECTOR: Thank you, Judge.

THE COURT: Thank you. Ms. Alper.

MS. ALPER: Yes, Judge, and I will try to respond to Mr. Spector's arguments in the order in which he presented them. With regard to his argument that 364(e) protects the bank, Hartford would argue that 364(e) arguably in this case it doesn't even apply. This is not an appeal of that order. One of the problems in this case is the lack of notice of the proceeding to The Hartford. In referring to an appeal, I believe 364(e) contemplates that the creditor had notice and an opportunity to be heard in the first instance, lost, [26] appealed and didn't post a bond to stay the appeal. With regard to the argument that the Boatmen's decision, where the bank expressly subordinated its debt to administrative claims, I think that the provisions of the Boatmen's order are irrelevant. To decide that this distinction compels a different result would allow a secured creditor to put in its order, no 506(c) claims, go out and maximize the value of its collateral, allow the debtor to continue to lose money, incur its administrative expenses, and then run off with all the proceeds and leave everybody hanging. Maybe that's okay in a case where the people knowingly are doing business with the debtor-in-possession, don't request payment in advance or adequate assurance that they're going to get paid, but in this instance you had a debtor whose monthly operating reports indicated from December 1991 forward that it wasn't paying its Comp. premiums. And all of those were filed with the Court, provided to the bank, I suppose, and they just

weren't paying them. Furthermore, if you look at Joint Exhibit 2, the debtor knew every month that it was incurring liability for Comp. coverage in at least the amount of $8,592. The budget amounts change over time. But it's in there. With respect to the argument that Hartford did not rely on 506(c) in allowing the debtor to go on, that's true. We didn't know about the bankruptcy proceeding. But furthermore, had we known about the bankruptcy proceeding, [27] there is enough case law out there indicating that a Worker's Comp. coverage is an executory contract. Hartford could have come in under §365, compelled the debtor to either assume the contract, pay the amount of pre-petition premiums to cure the default and go forward, or alternatively, even if the Court did not compel the debtor to assume the contract, they would have at least compelled the debtor to make sure that the payments of the premiums were made on a regular basis and the bank would have been on notice and everybody would have known and been protected going forward. Facts, you can't change them in terms of the equities of the case. The — clearly we have paid out less in claims than we have collected in premiums. We have, if you add the amount of claims now in reserve plus the amount we've paid out to-date, it is still less than the amount of premiums. There are still two open claims. Yes, that those amounts held in reserve may increase. They've increased about $20,000 in the last six months. Workers' Comp. premiums are, however, based on the amount of payroll in each classification multiplied by the rate in each state. They're not negotiable. The risk is there regardless of the amount of claims asserted. And regardless of the amount of claims that are paid out or reserved for, the premiums are what they are and the bank has provided no evidence whatsoever that the premiums charged were more

than what was on file with the insurance [28] Commissioners in each of the states where Hen House conducted business. With regard to the delinquencies in cancellations, I suppose, yes, The Hartford could have cancelled the policy or could have tried to cancel due to the debtor's non-compliance with completing its monthly reports of risk, could have cancelled in June when the full payment was not made. It appeared on a non-payment cancellation list. Ms. Zuk's deposition indicates that she then goes to underwriting for cancellation; Workers' Comp. requires 30 days notice of cancellation. But the time it got to the person to be cancelled, it was too late to cancel. The policy ran through its term. Hen House did make efforts and I did not read those portions of Ms. Zuk's deposition. Hartford did make efforts to collect from Hen House after the policy lapsed. Collection letters were sent, demands were made, they weren't responded to. With regard to the argument that the Boron standard remains alive, I disagree with Mr. Spector's argument in that if it did remain alive, I can't see how. The 8th Circuit reversed Judge See and the district court on the issue of whether or not the penalties and interest on the taxes were not chargeable under 506(c). Both Judge See and the district court felt that the penalties and interest were not consented to by the bank, were not contemplated by the bank, did not benefit the bank and, therefore, were not chargeable against the bank. The distinction that Mr. [29] Spector makes in the Boatmen's case with regard to the express subordination of the liens to administrative claims, as I argued earlier, I don't know that that's relevant. To make it so would mean that lenders could just simply stick a 506(c) buyer in their order and go merrily along and leave trailing behind them unpaid administrative claims while they maximize the value of their assets held as

collateral. With regard to Mr. Spector's argument that the initial lending in the Hen House case was to enable the debtor to reorganize, that was, in fact, the stated purpose. However, it became abundantly clear very early in the case — I think you — there is Mr. Pressman's examiner's report and then the flurry of motions filed sometime early in 1992 with regard to sales of assets, that it became clear that they were in that liquidation mode and everything was to be just sold off and the bank's collateral maximized. At the same time they continued to operate and incur additional unsecured debts, which went unpaid. In fact, I reviewed the Chapter 7 schedules which indicate a large number of trade, utility companies unpaid. Although, Hartford is listed as a creditor in those Chapter 7 schedules in an unknown amount, the debtor didn't put them on the matrix. So even when the Chapter 7 schedules were filed, we weren't notified. With regard to the distinction that the Boatmen's and Annette Ford case involved the IRS, I don't know that that distinction is [30] relevant in that the IRS, first of all, receives notice of every Chapter 11 case. They have the absolute right, if you're not paying your withholding taxes, to come in and shut you down immediately. And they often do. There's never a case where the IRS doesn't have notice of what's going on in a Chapter 11 case or that a Chapter 11 case is on file. Talking about a case where a creditor sat on their rights, I think the Boatmen's case was one where the IRS sat around for a couple of quarters, determined the amount and the extent of their claim by the length of time that they sat around, and also determined the penalties and interest by the length of time that they sat around. And the 8th Circuit found none of those things to be relevant in deciding that not only the amount of withholding taxes, but also the interest and

penalties accruing thereon were chargeable against their collateral. And in lieu of all of those factors, I think that the Hartford claim for an administrative expense and charged against Magna's collateral should be sustained. I would also ask for the opportunity to, in a week, ten days, to summarize those arguments in a brief memorandum and to respond with some contrary case law to Mr. Spector's memorandum regarding 364(e), namely, the 11th Circuit Saybrook (phonetic) opinion.

THE COURT: All right. Thank you very much. Did you have anything to add, Mr. Spector in rebuttal?

[31] MR. SPECTOR: Judge, unless you have questions, I think that you've heard it all.

THE COURT: No, I don't have any questions. You said ten days. Today is —

MS. ALPER: It's the 15th.

THE COURT: — the 5th. What about April 15th?

MS. ALPER: Sounds good, Judge.

THE COURT: Okay. Now, what I'd like both of you to do, in addition to whatever you want to file, Ms. Alper, if both of you will file for me a memorandum for my signature as if you're writing my opinion and an order to go with it. And all you've got to do is take the opinion I previously wrote, you can use that for form. So what I need from you is your viewpoint, if you were the judge, and considering the

evidence that we've had so far, a memorandum of findings of fact, conclusions of law, setting forth your client's position. And how much time do you need for that?

MR. SPECTOR: The same deadline is fine with me, if that's okay with Ms. Alper.

MS. ALPER: If you can maybe make it that Monday. That probably would be easier for me. The 18th. Is that a bad day for you, Judge?

THE COURT: No.

MS. ALPER: I'm looking at your calendar and I can't figure out what the circles and the X's all mean.

[32] THE COURT: The red circles are Mrs. Kehoe's reminder that on the 12th is, I think — I think the first red circle of the month is usually Diversified and the second one is Spirit. It's one way or the other.

MS. ALPER: Okay.

THE COURT: No, those dates — the 18th is fine, if that's what's agreeable with you.

MS. ALPER: Okay.

THE COURT: I don't really have any strong feelings. Anything further?

MS. ALPER: No, Your Honor.

Transcript of Hearing

THE COURT: Thank you very much. We'll stand adjourned.

(Proceedings concluded at 11:50 A.M.)

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MEMORANDUM OPINION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION DATED AUGUST 14, 1996

UNITED STATES BANKRUPTCY COURT
EASTERN DIVISION OF MISSOURI
EASTERN DIVISION

Case No. 91-45623-293
Chapter 7

In re

HEN HOUSE INTERSTATE, INC.,

Debtor.

HARTFORD UNDERWRITERS
INSURANCE COMPANY,

Movant,

– v –

MAGNA BANK OF ILLINOIS,

Respondent.

Motion No. 463

MEMORANDUM OPINION

JURISDICTION

This Court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. §§ 1334, 151, and 157 and Local Rule 29 of the United States District Court for the Eastern District of Missouri. This is a "core proceeding" pursuant to 28 U.S.C. §157(b)(2)(A), which the Court may hear and determine.

PROCEDURAL BACKGROUND

1. On September 5, 1991, Hen House Interstate, Inc. (Debtor), filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. On October 25, 1991, the Court entered its Final Order Authorizing Debtor to Obtain Post-Petition Secured Credit, Granting Senior Liens and Administrative Priority Expense, Modifying Automatic Stay, Providing Adequate Protection and Authorizing Agreements with Landmark Bank of Illinois (the Final Order).[1]

2. After the issuance of the Final Order, Magna Bank of Illinois provided this Debtor with debtor-in-possession financing in the amount of $300,000 and allowed the Debtor to use Magna's cash collateral.

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1. When the Final Order was entered, Landmark Bank of Illinois extended financing to the Debtor. Later, Magna Bank of Illinois succeeded to the interest of Landmark Bank of Illinois. For convenience, reference is made to Magna throughout this opinion, notwithstanding that certain facts pertain to Landmark Bank prior to its acquisition by Magna.

3. On January 20, 1993, this case was converted to a Chapter 7 proceeding. The Court appointed Robert J. Blackwell to serve as trustee of the Chapter 7 estate.

4. On June 29, 1993, Hartford Underwriters Insurance Company (Hartford) filed an Application for Allowance of Administrative Expense Pursuant to 11 U.S.C. § 503 and Charge Against Collateral Pursuant to 11 U.S.C. § 506(c) (the Hartford Application). In the Hartford Application, Hartford asked the Court to authorize it to employ section 506(c) and recover the unpaid workers' compensation premiums Debtor owed it for coverage provided post-petition from property securing Magna's claim. Magna objected to the Hartford Application.

5. Magna argues that the Court should deny the Hartford Application for the following reasons:

1. The Court cannot modify or ignore provisions in the Final Order specifically prohibiting the type of relief requested in the Hartford Application.

2. The equities in this case weigh against allowing Hartford to charge Magna's collateral with the remaining outstanding balance on the Debtor's workers' compensation insurance premiums.

3. Hartford's claim for unpaid workers' compensation does not satisfy the narrow standard for recovery under section 506(c) enunciated by the Eighth Circuit in *Brookfield Production Credit Association v. Borron*, 738 F.2d 951 (8th Cir. 1984),

which Magna maintains remains in existence and applies to this case, notwithstanding the broad section 506(c) standard used by the Eighth Circuit in *I.R.S. v. Boatmen's First National Bank of Kansas City*, (hereinafter *Boatmen's*) 5 F.3d 1157 (8th Cir. 1993).

In response, Hartford argues that:

1. The provisions of the Final Order should not apply to Hartford because it was not aware of the Debtor's bankruptcy proceedings until March of 1993 and did not receive actual notice of the Final Order's entry.

2. The equities of the case favor Hartford.

3. The broad standard for recovery under section 506(c) used by the Eighth Circuit in the *Boatmen's* decision applies to this case and has been satisfied by Hartford.

6. The Court conducted an evidentiary hearing. The evidence consisted of a Trial Stipulation of Facts agreed upon and submitted jointly by Hartford and Magna and four exhibits consisting of (i) the Debtor's Emergency Motion for Order Authorizing Debtor to Obtain Post-Petition Financing Pursuant to 11 U.S.C. 364, and Granting Adequate Protection to Pre-Petition Secured Party; (ii) the Emergency Order entered by the Court on September 6, 1991, authorizing the debtor-in-possession financing on an emergency basis; (iii) the Final Order; and (iv) the transcript, together with all

exhibits thereto, including the deposition of Mary Zuk, Hartford's designated representative, who testified on Hartford's behalf. No other evidence was adduced at trial.

JOINT STIPULATION OF FACTS

The parties stipulated to the following facts as true:

1. Hen House filed Chapter 11 proceedings on September 5, 1991.

2. Hartford provided workers' compensation insurance coverage for the Debtor for the period from September 1, 1991, through September 1, 1992. The Debtor was required to carry insurance during that period.

3. The Debtor previously paid premiums totaling $82,294 to Hartford on account of the insurance

4. Hartford claims that it still is owed $51,871.40 for the insurance premiums for the post-petition period during which the Insurance was in force. Magna has no evidence to the contrary with respect to the amount outstanding.

5. Hartford has paid losses on worker's compensation claims made under the insurance totaling $32,551. In addition, Hartford presently has reserved, but has not been paid, $38,549 on account of potential losses. As of August 1993, the amount held in reserve on account of potential losses was $20,821. The total amount of losses actually paid by Hartford under the insurance increased by $179 from August of 1993 to April 5, 1994. No further claims were made as of September 1992.

6. In making the post-petition debtor-in-possession loan to the Debtor, Magna anticipated that it, as well as the Debtor's other creditors, would receive a greater return through a Chapter 11 filing in which the Debtor's operations would continue in hope of reorganization, rather than from an immediate liquidation of the Debtor's property outside of Chapter 11.

7. When the Debtor filed a petition under Chapter 11 on September 5, 1991, the Debtor anticipated that it would continue its operations and reorganize its business. The reorganization prospects did not materialize and sometime in 1992, the Debtor liquidated its assets through a combination of going-concern sales and sales of shut-down properties.

8. As of September 5, 1991, the Debtor owed Magna approximately $4 million.

9. Magna has not received the full amount owed to it by the Debtor. Magna has lost approximately $1,500,000 in principal, plus additional amounts for unpaid interest and attorneys fees and expenses.

10. Magna previously disbursed to the Debtor the full $300,000 available under the post-petition debtor-in-possession loan it made to the Debtor.

11. Hartford was not aware of the Debtor's bankruptcy proceedings until March of 1993.

The Court accepts and adopts those facts set forth in the above Joint Stipulation of Facts along with the following findings as the Court's findings of fact:

Paragraph 33 of the Final Order provided the following express prohibition against charging Magna or its collateral with administrative expenses under section 506(c) of the Bankruptcy Code. The Final Order stated:

> 33. Except for the Carve-Out [$10,000 for professional fees], no expenses of administration of Debtor's Chapter 11 case or any future proceeding which may develop out of such case, including liquidation in bankruptcy or other proceeding under the Bankruptcy Code, shall be charged against Landmark or the Collateral, whether pursuant to 506(c) of the Bankruptcy Code or otherwise, without the prior written consent of Landmark, and no such consent shall ever be implied from any action, inaction or acquiescence by Landmark.

DISCUSSION

The issues in the present case are: 1) whether Hartford, an administrative claimant who provided workers' compensation insurance post-petition for the Debtor, has standing to recover those expenses under 11 U.S.C. § 506(c); and 2) whether payment of workers' compensation insurance is a reasonable and necessary expense for preserving or disposing of the Debtor's bankruptcy estate.[2] Magna, the

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2. The Court notes that, initially, Hartford's standing to bring suit under § 506(c) was challenged, *see* Objection of Magna Bank of Illinois to Hartford Underwriters Insurance Company Application for Allowance of Administrative Expense Pursuant to 11 U.S.C. (Cont'd)

secured creditor, stipulates to the fact that it agreed to the continued operation of the business post-petition.

The bankruptcy estate generally must pay administrative expenses out of the unencumbered assets of the debtor. *Boatmen's*, 5 F.3d 1157, 1159 (8th Cir. 1993). In most instances, it cannot charge those expenses to the secured creditors against their collateral pursuant to section 503. An exception to that rule exist under section 506(c). Section 506(c) states, "[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of the claim." The section was intended to prevent the secured creditor from benefitting at the expense of the trustee or debtor in possession. It applies in situations where an estate

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(Cont'd)
Section 506(c), but at the hearing held on this matter, Magna conceded that under the Eighth Circuit's *Boatmen's* decision, Hartford has standing. The majority of the Circuits which have published opinions on this issue have read section 506(c) broadly enough to permit administrative claimants standing to recover. *See Boatmen's*, 5 F.3d at 1159; *North County Jeep and Renault, Inc. v. Gen. Elec. Credit Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229 (9th Cir. 1991), *cert. denied*, 506 U.S. 821, 113 S.Ct. 71 (1992); *In re Parque Forestal, Inc.*, 949 F.2d 504 (1st Cir. 1991); *New Orleans Pub. Serv. Inc. v. First Fed. Sav. and Loan Ass'n. (In re Delta Towers, Ltd.)*, 924 F.2d 74 (5th Cir. 1991); *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91 (3d Cir. 1986). *Contra Ford Motor Credit Co. v. Reynolds & Reynolds Corp. (In re JKJ Chevrolet)*, 26 F.3d 481, 486 (4th Cir. 1994) (holding that only trustee has standing to bring suit under section 506(c)).

continues to operate primarily for the benefit of the secured creditor.

In *Boatmen's* the Court required Boatmen's, a secured creditor, to pay post-petition payroll taxes as costs of preserving the debtor as a going concern. *Id.* The case involved a company that owned and operated a string of dry cleaning stores. *Id.* at 1158. When the company filed for bankruptcy, the secured creditor, Boatmen's, agreed to extend credit to debtor post-petition so that it could continue operating and sell its business as a going concern. *Id.* at 1160. It did so with the experience of receiving a higher return on its investment from the sale of a going concern rather than a liquidation sale. *Id.* In fact, more than half of the debtor's stores were sold as going concerns. *Id.* at 1158-59. The Court explained its holding, "[t]he creditor, however, in the expectation of an overall benefit, agreed to accept the expenses and risks associated with that anticipated benefit. One of those expenses was payroll taxes, and one of the risks was nonpayment of the taxes and its consequences." *Id.* The Court viewed the unpaid taxes as a de facto loan from the government without which the estate could not have continued operations. *Id.* The creditor in Boatmen's agreed to accept the risk of continuing operations and the risk paid off. Boatmen's received a greater return on its investment than it would have in a liquidation.

The *Boatmen's* court frequently cited *United States v. Annett Ford, Inc. (In re Annett Ford)*, 64 B.R. 946 (D. Neb. 1986). The *Annett Ford* court addressed the same issues as the *Boatmen's* court but the secured creditor in *Annett Ford* was less fortunate than the secured creditor in *Boatmen's*.

Despite the fact that the continued operation of the business did not prove successful, the *Annett Ford* court found, "[t]he preservation of the going concern value of a business can constitute a benefit to a secured creditor under 11 U.S.C. § 506(c)." *Id.* at 947. The *Boatmen's* court adopted the *Annett Ford* court's analysis and did not limit its holding to recovery for administrative claimants who receive overall financial benefit. *Boatmen's*, 5 F.3d at 1160.

The *Boatmen's* and *Annett Ford* courts based their holdings on the theory that when a creditor agrees to the continued operation of a debtor's business, it also agrees to accept the risks associated with the potential benefit it seeks. Administrative claims such as unpaid payroll taxes and penalties are a foreseeable risk.

Although facts in the present case are similar to those in *Boatmen's*, they are more like the facts in *Annett Ford*. The secured creditor, Magna, agreed to the continued operation of Debtor's business under a Chapter 11 plan of reorganization. Virtually all real and personal property of the Debtor was encumbered by and subject to Magna's first priority perfected lien. Magna stood to benefit the most from a successful reorganization. When Magna agreed to the continuing operation of the Debtor, it openly expressed its hopes of receiving an increase on its return. In so agreeing, Magna implicitly agreed to accept the risks associated with the hoped for benefit. Under Missouri workers' compensation laws, an operating business is obligated to maintain workers' compensation insurance unless it can demonstrate that it has the ability, alone or in a group, to self-insure itself. See Mo. Rev. Stat. § 287.280 (1994). Thus, the cost of the insurance

Hartford provided was a reasonable, necessary and foreseeable expense of continuing this business operations. Unfortunately for Magna, the risk did not produce the desired results, and the continued operation of the business failed to improve its recovery. However, this does not preclude the administrative claimant from recovering. A secured creditor who is willing to benefit from a successful reorganization may not circumvent its responsibility to pay for necessary expenses with the use of disclaimers such as the one used in Paragraph 33 of the Final Order.

In its brief to the Court, Magna makes three arguments against allowing Hartford to collect its claim from Magna's collateral. First, Magna argues that this Court cannot modify or ignore Paragraph 33 of the Final Order which prohibits charging Magna's collateral for post-petition administrative expenses. It argues that: 1) to do so would discourage creditors from making post-petition loans; 2) Magna loaned the money in reliance on the language in Paragraph 33; and 3) Hartford did not know about the bankruptcy proceeding until after it extended the credit and could not have done so in reliance on rights under section 506(c). Magna misunderstands the holding in *Boatmen's*. The pertinent question under section 506(c) is whether the secured creditor agreed to the continuing operation of the business with the hope that the continuation would allow it to recover more than it would have in a liquidation. If it did, then according to the Eighth Circuit, along with the potential for benefit, it accepted the risk of foreseeable costs and expenses of preserving the business. Paragraph 33 is not relevant to the inquiry. An administrative claimant has standing under section 506(c) if it extends reasonable and necessary services

to the debtor. Furthermore, the administrative claimant is not required to show reliance on section 506.

Second, Magna argues that equities in the case weigh against allowing Hartford to charge Magna's collateral. The Court disagrees. Equities do not permit Magna to receive a windfall at the expense of the Debtor or the estate's administrative claimants. Because the attempt to reorganize was primarily for the benefit of Magna, Magna must pay the costs.

Third, Magna attempts to distinguish the facts in the present case from *Boatmen's* and asks the Court to apply the stricter standard for recovery under section 506(c) enunciated in an earlier Eighth Circuit case, *Brookfield Prod. Credit Ass'n. v. Borron*, 738 F.2d 951 (8th Cir. 1984). Magna's reliance on *Borron* is misplaced. The *Borron* case involved Debtors who used the proceeds from the sale of the secured creditor's collateral to pay other creditors. The Circuit Court held that the Debtors, not the secured creditor, benefitted from the continued operation of the business and it refused to charge the secured creditor for administrative expenses. The facts in the present case are distinguishable from those in *Borron*. The primary beneficiary of Hen House's continued operation was Magna and the payment of workers' compensation insurance was an expense necessary to Hen House's continued operation. The extension of insurance coverage was a benefit to the secured creditor who would not have had the opportunity to attempt greater recovery without it. Workers' compensation insurance or a demonstrated ability to self-insure one's potential liability, like taxes, is required by law in Missouri. Unlike the *Borron*

debtor, Hen House did not take proceeds from Magna's collateral and use it to pay its unsecured creditors.

The Court holds that Magna, a secured creditor who agreed to the preservation of the debtor's business as a going concern, shall be charged with the payment of post-petition workers' compensation premiums under 11 U.S.C. § 506(c) as reasonable and necessary expenses.

An Order consistent with this Memorandum Opinion will be entered this date.

s/ David P. McDonald
DAVID P. McDONALD
U. S. Bankruptcy Judge

DATED: August 14, 1996
St. Louis, Missouri

UNITED STATES BANKRUPTCY COURT
EASTERN DIVISION OF MISSOURI
EASTERN DIVISION

Case No. 91-45623-293
Chapter 7

In re

HEN HOUSE INTERSTATE, INC.,

Debtor.

HARTFORD UNDERWRITERS
INSURANCE COMPANY,

Movant,

– v –

MAGNA BANK OF ILLINOIS,

Respondent.

Motion No. 463

ORDER

For the reasons set forth in the Memorandum Opinion filed this date, it is

ORDERED THAT Magna Bank of Illinois, a secured creditor who agreed to the preservation of the debtor's business as a going concern, shall be charged with the payment of post-petition workers' compensation premiums under 11 U.S.C. § 506(c) as reasonable and necessary expenses.

s/ David P. McDonald
DAVID P. McDONALD
U. S. Bankruptcy Judge

Dated: August 14, 1996
St. Louis, Missouri

NOTICE OF APPEAL TO THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION DATED AND FILED AUGUST 23, 1996

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 91-45623-293
Chapter 7

Motion No. 463

In re

HEN HOUSE INTERSTATE, INC.,

Debtor.

HARTFORD UNDERWRITERS INSURANCE COMPANY,

Movant,

v.

MAGNA BANK OF ILLINOIS, N.A.,

Respondent.

NOTICE OF APPEAL

Magna Bank of Illinois, N.A., the respondent, appeals under 28 U.S.C. § 158(a) from the Order entered by the United States Bankruptcy Court for the Eastern District of

Notice of Appeal to United States Bankruptcy Court

Missouri granting Hartford Underwriters Insurance Company's Application for Allowance of Administrative Expense Pursuant to 11 U.S.C. § 503 and Charge Against Collateral Pursuant to U.S.C. § 506(c) entered in this contested matter on the fourteenth (14th) day of August, 1996.

The parties to the order appealed from and the names of their respective attorneys are as follow:

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Notice of Appeal to United States Bankruptcy Court

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APPELLANT/RESPONDENT
MAGNA BANK OF ILLINOIS
N.A.

STIPULATION WITH RESPECT TO BANKRUPTCY COURT ORDER FROM WHICH APPEAL HAS BEEN TAKEN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Case No. 91-45623-293
Chapter 7

District Case No. ____

In re

HEN HOUSE INTERSTATE, INC.,

Debtor.

MAGNA BANK OF ILLINOIS, N.A.,

Appellant/Respondent,

v.

HARTFORD UNDERWRITERS
INSURANCE COMPANY,

Appellee/Movant.

STIPULATION WITH RESPECT TO BANKRUPTCY COURT ORDER FROM WHICH APPEAL HAS BEEN TAKEN

Stipulation re Bankruptcy Court Order

COME NOW Appellant/Respondent Magna Bank of Illinois, N.A. ("Appellant") and Appellee/Movant Hartford Underwriters Insurance Company ("Appellee") and jointly stipulate and agree to the following regarding the Order entered by the United States Bankruptcy Court for the Eastern District of Missouri granting Hartford Underwriters Insurance Company's Application for Allowance of Administrative Expense Pursuant to 11 U.S.C. § 503 and Charge Against Collateral Pursuant to 11 U.S.C. § 506(c) (the "Order"), with respect to which Order Appellant has taken an appeal to this Court:

1. On August 14, 1996, The Honorable David P. McDonald, the United States Bankruptcy Judge for the Eastern District of Missouri, entered the Order. On August 23, 1996, Appellant timely filed its Notice of Appeal in regard thereto.

2. Pursuant to the Order, the Bankruptcy Court ordered that Appellant's collateral "be charged with the payment of post-petition workers' compensation premiums under 11 U.S.C. § 506(c)." The Order, however, did not specify the amount of post-petition workers' compensation premiums to be so charged.

3. In conjunction with the entry of the August 14, 1996 Order, the Bankruptcy Court also entered a Memorandum Opinion which contained a recitation of certain jointly Stipulated Facts, including, the fact that Appellee "claims that it still is owed $51,871.40 for the insurance premiums for the post-petition period during which the Insurance is in force [and] [Appellant] has no evidence to the contrary with respect to the amount outstanding."

Stipulation re Bankruptcy Court Order

4. Appellant and Appellee jointly stipulate and agree that the amount of post-petition workers' compensation premiums referenced in the Order is and was intended to be the $51,871.40 figure set forth in the Bankruptcy Court's Memorandum Opinion.

5. Appellant and Appellee further jointly stipulate and agree that neither party shall assert or otherwise maintain that the Bankruptcy Court's August 14, 1996 Order is deficient, not final, or otherwise non-appealable specifically because it does not set forth the foregoing dollar amount.

Respectfully submitted,

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INSURANCE COMPANY

MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION DATED SEPTEMBER 10, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:96-CV-1991 CAS

In Re:

HEN HOUSE INTERSTATE, INC.

Debtor.

MAGNA BANK OF ILLINOIS,

Appellant,

v.

THE HARTFORD UNDERWRITERS INSURANCE COMPANY,

Appellee.

MEMORANDUM

This is an appeal from a final order of the United States Bankruptcy Court for the Eastern District of Missouri granting appellee The Hartford Underwriters Insurance Company's ("Hartford") Application for Allowance of

Memorandum Dated September 10, 1997

Administrative Expense Pursuant to 11 U.S.C. § 503 and Charge Against Collateral Pursuant to 11 U.S.C. § 506(c). *In re Hen House Interstate, Inc.*, No. 91-45623-293 (Bankr. E.D. Mo. Aug. 14, 1996). The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 158(a) and Rule 8001 of the Federal Rules of Bankruptcy Procedure.

The Bankruptcy Court's order permits Hartford to impose a charge on appellant Magna Bank of Illinois, N.A.'s ("Magna")[1] collateral under 11 U.S.C. § 506(c), for the administrative expense of worker's compensation insurance premiums. Hartford provided workers' compensation insurance to the debtor, Hen House Interstate, Inc., ("Debtor") from September 1, 1991 through September 1, 1992.

In this appeal, Magna contends the Bankruptcy Court erred as follows:

> (1) in holding that Hartford, as a party other than a bankruptcy trustee or debtor-in-possession, had standing to seek relief under the provisions of 11 U.S.C. § 506(c);
>
> (2) in holding that because Magna agreed to the continuing operation of the Debtor's business with

---

1. Appellant is presently known as Magna Bank, N.A. It is the successor in interest to the rights, claims and interests of Landmark Bank of Illinois under various financing and loan documents. For purposes of convenience, appellant is referred to as Magna throughout this memorandum, although certain facts pertain to Landmark Bank of Illinois prior of its acquisition by Magna.

the hope that the continuation would allow Magna to recover more than it would in a liquidation, Hartford could surcharge Magna's collateral 11 U.S.C. § 506(c) for any reasonable and necessary services provided to the Debtor, without requiring any showing that such services directly benefited Magna, and in granting Hartford's 11 U.S.C. § 506 (c) application even though no much showing was made in this case;

(3) in finding that it would not be inequitable to allow Hartford to surcharge Magna's collateral under 11 U.S.C. § 506(c) for unpaid worker's compensation insurance premiums; and

(4) in allowing Hartford to surcharge certain charges against Magna's collateral pursuant to the provisions of 11 U.S.C. § 506(c) after having previously entered a final order pursuant to the provisions of 11 U.S.C. § 364(c) and (d) that explicitly prohibited the imposition of any such charges against Magna's collateral without Magna's prior written consent, which consent was never given.

For the reasons which follow, the Court concludes the decision of the Bankruptcy Court should be affirmed.

Discussion.

In reviewing the judgment of the bankruptcy court, this Court reviews legal conclusions *de novo* and findings of fact

under a clearly erroneous standard. *In re Kiellsen*, 53 F.3d 944, 946 (8th Cir. 1995); *In re Muncrief*, 900 F.2d 1220, 1225 (8th Cir. 1990). The parties agree that issues 1, 2 and 4 present questions of law requiring *de novo* review, while issue 3 is subject to review under an abuse of discretion standard.

The Court adopts the Bankruptcy Court's statement of procedural background of this case and its factual findings, including the joint stipulation by the parties, as set forth in the Bankruptcy Court's Memorandum Order of August 14, 1996, at 1-6.

1. *Standing*. Magna argues that because Hartford is neither the bankruptcy trustee nor the debtor-in-possession, it lacks standing to seek recovery under 11 U.S.C. § 506(c). Magna contends the literal language of that statute clearly limits standing to the trustee and the debtor-in-possession, and thus there is no basis for permitting a third party to recover under § 506(c).

The Eighth Circuit has resolved this question contrary to Magna's position. *In United States I.R.S. v. Boatmen's First Nat'l Bank of Kansas City*, 5 F.3d 1157, 1159 (8th Cir. 1993) ("*Boatmen's*"), the Court unequivocally held that an administrative claimant has standing to recover under § 506(c). This Court is not free to disregard binding Eighth Circuit precedent. Thus, the Court concludes the Bankruptcy Court did not err in holding that Hartford, as an administrative claimant, has standing to recover under 11 U.S.C. § 506(c).

2. *Benefit to Magna*. Magna next argues that the Bankruptcy Court erred as a matter of law in holding Hartford was entitled to surcharge Magna's collateral for the amounts in question simply because Magna agreed to the continued operation of Debtor's business in Chapter 11 with the hope that the continuation would allow Magna to recover more than in a liquidation. Magna contends Hartford did not meet its burden to establish that the administrative expense directly benefited Magna.

Section 506(c) of the Bankruptcy Code is an exception to the general rule that administrative expenses of a bankruptcy estate may not be charged against secured collateral but rather share in the distribution of unencumbered assets of the debtor pursuant to 11 U.S.C. § 503. *Boatmen's*, 5 F.3d at 1159. Section 506(c) expresses and applies "the equitable principle that a lienholder may be charged with the reasonable costs and expenses incurred by the debtor . . . which are required to preserve or dispose of the property subject to lien to the extent the lienholder derives a benefit therefrom." 4 L. King, *Collier on Bankruptcy* ¶ 506.04, at 506-49 (15th Ed. rev. 1997).

Under § 506(c), an administrative expense may be surcharged against a secured creditor's collateral if three elements are established: (i) the expense was necessary; (ii) the expense was reasonable; and (iii) the expense directly benefited the secured creditor. *Brookfield Production Credit Ass'n v. Borron*, 738 F.2d 951, 952 (8th Cir. 1984) ("*Borron*"). Magna does not dispute the Bankruptcy Court's determination that the cost of the insurance provided by Hartford was a reasonable and necessary expense of

continuing Debtor's business operations. Magna contends only that the third element is not met, in that Magna was not directly benefited by the worker's compensation insurance.

Relying on the *Boatmen's* decision, the Bankruptcy Court held that because Magna agreed to the continued operation of the Debtor's business with the hope that the continuation would allow it to recover more than it would in a liquidation, it accepted the risk of being charged with the reasonable and necessary costs and expenses of preserving the business. This Court agrees. Where a holder of secured credit consents to the preservation of a debtor's business as a going concern, a "court may treat such consent as an advance acknowledgement that certain of the costs and expenses incurred would benefit such holder. Thus, when such consent has been given, the courts will allow a greater latitude with respect to allowance of costs and expenses." 4 *Collier* ¶ 56.04[3][a][i] at § 506-54,-55; *see Boatmen's*, 5 F.3d at 1160 (allowing recovery of postpetition payroll taxes including penalty and interest where the secured creditor consented to preservation of the debtor's business as a going concern); *In re Annett Ford, Inc.*, 64 B.R. 946, 947 (D. Neb. 1986) (allowing recovery of payroll taxes, penalty and interest which were costs of unsuccessful postpetition operation of business consented to by secured creditor).

In this case, after Magna initially sought relief from the automatic stay, it decided instead to make a $300,000.00 post-petition debtor-in-possession loan to the Debtor. In so doing, Magna anticipated it would receive a greater return through a Chapter 11 filing in which the Debtor's operations

would continue in the hope of a reorganization, rather than from an immediate liquidation of the Debtor's property outside of Chapter 11. Magna was the primary beneficiary of Debtor's continued operation. The payment of worker's compensation insurance was an expense necessary to Debtor's continued operation, as worker's compensation insurance or a demonstrated ability to self-insure is required by law in Missouri. Thus, it follows under *Boatmen's* and *Annett Ford* that the insurance expense may be charged against Magna, even though the Debtor's Chapter 11 reorganization was ultimately unsuccessful.

The fact that the secured creditor in *Boatmen's* specifically agreed to subordinate its post-petition superpriority liens to legitimate administrative expenses of the bankruptcy estate, while relevant to the Eighth Circuit's decision, is not controlling and does not require a different result in this case. The holding of *Boatmen's* turns on the secured creditor's agreement to the preservation of the debtor as a going concern, not its agreement to be subordinated to administrative expenses. *Boatmen's*, 5 F.3d at 1160.

The Eighth Circuit's earlier *Borron* decision, on which Magna relies, is distinguishable because the secured creditor in *Borron* did not consent to continuation of the debtor's business as a going concern. As a result, the Court applied a stricter standard under which a direct, quantifiable benefit to the secured credit must be shown before an administrative expense may be surcharged against secured collateral.

Therefore, the Court concludes the Bankruptcy Court did not err in holding that Hartford could surcharge Magna's

collateral under 11 U.S.C. § 506(c) for worker's compensation insurance premiums.

3. *Abuse of Discretion.* Next, Magna contends that the Bankruptcy Court abused its discretion in permitting Hartford to surcharge Magna's collateral under 11 U.S.C. § 506(c), when Hartford (i) had already received premium payments in excess of any insurance benefits it would have to pay out on the Debtor's behalf, and thus is not seeking to recover for actual losses sustained but rather to obtain a profit; (ii) displayed an extraordinary lack of diligence in protecting its rights under the insurance policy and thus failed to take reasonable efforts to reduce its claim; and/or (iii) expressly acknowledged that it did not rely on the provisions of § 506(c) in providing unsecured credit to the Debtor.

The Court will not reverse the Bankruptcy Court's decision unless that court abused its sound discretion. *In re Jones Truck Lines, Inc.*, 63 F.3d 685, 686 (8th Cir. 1995). "Abuse of discretion will be found only when the . . . court's decision is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Richards v. Aramark Services, Inc.*, 108 F.3d 925, 927 (8th Cir. 1997) (citation omitted). Generally, a discretionary decision will not be reversed if the decision "remains within 'the range of choice' available to the . . . court, accounts for all relevant factors, does not rely on any irrelevant factors, and does not constitute a 'clear error of judgment.' " *Walser v. Toyota Motor Sales, U.S.A., Inc.*, 43 F.3d 396, 401 (8th Cir. 1994) (quoting *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984)).

Magna contends that the Bankruptcy Court's decision to permit the Hartford surcharge was a clear error of

judgment. This Court disagrees. Magna does not contest the Bankruptcy Court's factual findings that (i) Magna stood to benefit the most from a successful reorganization of the Debtor; (ii) the Debtor's attempted reorganization was primarily for the benefit of Magna; (iii) Magna was the primary beneficiary of the Debtor's continued operations; and (iv) the cost of the worker's compensation insurance was a reasonable and necessary expense of continuing the business. Under these circumstances, it is not an abuse of discretion to require Magna to bear the reasonable and necessary expense of insurance coverage the Debtor was required to carry by state law.

Therefore, the Court concludes the Bankruptcy Court did not abuse its discretion in holding that Hartford could surcharge Magna's collateral under 11 U.S.C. § 506(c) for worker's compensation insurance premiums.

4. *Final Debtor In Possession Order.* Finally, Magna argues that the Bankruptcy Court erred in allowing Hartford to surcharge Magna's collateral under § 506(c), after the Court previously entering a final order pursuant to 11 U.S.C. § 364(c) and (d) which explicitly prohibited the imposition of any administrative expense charges against Magna's collateral without Magna's prior written consent.[2]

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2. *See* Final Order Authorizing Debtor to Obtain Post-Petition Secured Credit, Granting Senior Liens and Administrative Priority Expense, Modifying Automatic Stay, Providing Adequate Protection and Authorizing Agreements with Landmark Bank of Illinois, dated October 25, 1991 (the "Final DIP Order"). Paragraph 33 of the Final DIP Order states,

(Cont'd)

Magna argues that (i) under 11 U.S.C. § 364(e), a bankruptcy court cannot modify or alter its own postpetition financing order; (ii) Magna had a right to rely on the enforceability of the Final DIP Order; and (iii) by permitting Hartford to recover under § 506(c), the Bankruptcy Court deprived Magna of its protections under the Final DIP Order, and effectively modified the Order. Magna relies primarily on the Seventh Circuit's decision in *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1355 (7th Cir. 1990) ("*Kham & Nate's*") for the proposition that a postpetition financing order cannot be modified by a bankruptcy court, even if it was erroneous or illegal when entered.[3]

The Bankruptcy Court's determination that Magna was not entitled to the protection of § 364(e) derives from its interpretation of the 8th Circuit's *Boatmen's* decision. The Bankruptcy Court found the pertinent inquiry in determining

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(Cont'd)

> 33. Except for the Carve-Out [$10,000.00 for professional fees], no expenses of administration of Debtor's Chapter 11 case or any future proceeding which may develop out of such case, including liquidation in bankruptcy or other proceeding under the Bankruptcy Code, shall be charged against [Magna] or the Collateral, without the prior written consent of [Magna], and no such consent shall ever be implied from any action, inaction or acquiescence by [Magna].

3. The language of 11 U.S.C. § 364(e) is limited to reversal or modifications of orders on appeal. For purposes of this motion, the Court assumes without deciding that § 364(e) applies to a bankruptcy court's modification of its own orders.

whether a charge should be imposed under § 506(c) is whether the secured creditor agreed to the continuation of the Debtor's business with the hope that the continuation would allow the creditor to recover more than it would in a liquidation. Record on Appeal at 29, p. 10. The Court stated the Final DIP Order provision was "not relevant to the inquiry", *id.*, and noted further, "A secured creditor who is willing to benefit from a successful reorganization may not circumvent its responsibility to pay for necessary expenses with the use of disclaimers such as the one used in Paragraph 33 of the Final [DIP] Order." *Id.*, pp. 9-10.

The parties have not cited any authority from the Eighth Circuit concerning the effect of 11 U.S.C. § 364(e) on a claim for a surcharge of administrative expenses under § 506(c), and the Court has found none in independent research. Some authority exists in other jurisdictions that provisions in postpetition financing orders which prohibit the payment of § 506(c) administrative expenses from secured collateral are unenforceable. *See, e.g., In re Willingham Invs., Inc.*, 203 B.R. 75, 79 (Bankr. M.D. Tenn 1996) (vacating portion of a postpetition cash collateral order which attempted to prohibit payment of administrative expenses from the secured creditor's collateral, where the continuation of the debtor's business in Chapter 11 occurred primarily for the benefit of the undersecured creditor); *McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (Bankr. W.D. Mich. 1991) (refusing to enforce provision of cash collateral order attempting to immunize secured creditor from any surcharge payment obligations under 11 U.S.C. § 506(c) "in light of the congressional mandate that a trustee have the authority to use a portion of secured collateral for its

preservation or proper disposal "); *see also* Stephen A. Stripp, *Balancing of Interests in Orders Authorizing Use of Cash Collateral in Chapter 11*, 21 Seton Hall L. Rev. 562, 578-79 (1991) (noting that while many cash collateral orders operate to prohibit claims under § 506(c), debtors, who are parties to the order, should not be permitted to waive the rights of other potential claimants).

The Court finds these authorities persuasive. As discussed more fully above, the Debtor's attempted reorganization was primarily for the benefit of Magna, Magna was the primary beneficiary of the Debtor's continued operations, and the cost of the workers' compensation insurance was a reasonable and necessary expense of continuing the Debtor's business. Under these circumstances, to permit Magna and the Debtor to agree between themselves that the expense of mandatory workers' compensation insurance may not be charged against Magna's collateral would be inequitable and would constitute a windfall for Magna at Hartford's expense.

In the alternative, the Court also concludes the Final DIP Order provision is unenforceable against Hartford based on due process considerations. It is undisputed that Hartford did not know Debtor had filed for bankruptcy protection until 1993. Hartford had no notice of the proceedings which led up to issuance of the Final DIP Order in October 1991, was not a party to the Order, and was not served with the Order. While notice of the Final DIP Order was given to the twenty largest unsecured creditors in accordance with Federal Rule of Bankruptcy Procedure 4001(c)(1) and (d)(1), only the Debtor and Magna's predecessor in interest were signatories to the Order.

Memorandum Dated September 10, 1997

It is true that a creditor must be able to rely on a bankruptcy court's financing order. Nonetheless, the rationale of the *Kham & Nate's* decision cited by Magna has been held not to apply where a debtor and lender ignore the due process rights of third parties. *See In re Marrs-Winn Co., Inc.*, 103 F.3d 584, 595 (7th Cir. 1996); *In re Tek-Aids Indus., Inc.*, 145 B.R. 253, 258-59 (Bankr. N.D. Ill. 1992); *In re Visual Indus., Inc.*, No. 94-3414, slip op. at 12 n.6 (D.N.J. Sept. 26, 1994). Because Hartford had no notice of the Final DIP Order and no opportunity to challenge it, the Court concludes the Order's provision prohibiting the charge of any administrative expense against Magna's collateral without its consent is not enforceable against Hartford.

For these reasons, the Court concludes the Bankruptcy Court did not err in holding that Paragraph 33 of the Final DIP Order does not preclude the imposition of a surcharge against Magna's collateral under 11 U.S.C. § 506(c).

Conclusion.

For the foregoing reasons, the Court concludes that the judgment of the Bankruptcy Court should be affirmed. An appropriate judgment will accompany this memorandum.

s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES DISTRICT
JUDGE

Dated this 10th day of September, 1997.

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED OCTOBER 9, 1997

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MISSOURI

Case No. 4:96-CV-1991-CAS

In re

HEN HOUSE INTERSTATE, INC.,

Debtor.

HARTFORD UNDERWRITERS
INSURANCE COMPANY,

Movant,

v.

MAGNA BANK, N.A.
f/k/a MAGNA BANK OF ILLINOIS, N.A.,

Respondent.

NOTICE OF APPEAL TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Magna Bank, N.A. f/k/a Magna Bank of Illinois, N.A., the respondent in the bankruptcy case below, hereby appeals to the United States Court of Appeals for the Eighth Circuit

from the final judgment of the United States District Court for the Eastern District of Missouri entered in this case on September 10, 1997, affirming an order entered by the United States Bankruptcy Court for the Eastern District of Missouri on August 14, 1996 granting movant Hartford Underwriters Insurance Company's Application for Allowance of Administrative Expense Pursuant to 11 U.S.C. § 503 and Charge Against Collateral Pursuant to 11 U.S.C. § 506(c).

The parties to the judgment appealed from and the names of their respective attorneys are as follows:

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APPELLANT/RESPONDENT
MAGNA BANK, N.A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED JULY 27, 1998

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 97-3859

In re: Hen House Interstate, Inc.,

Debtor.

Hartford Underwriters Insurance Company,

Movant – Appellee,

v.

Magna Bank, N.A., formerly known as Magna Bank of Illinois, N.A.,

Respondent – Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: May 12, 1998
Filed: July 27, 1998

Order Granting Rehearing Sept. 22, 1998.

Before BOWMAN, Chief Judge, HEANEY and HANSEN, Circuit Judges.

BOWMAN, Chief Judge.

Opinion Dated July 27, 1998

Hartford Underwriters Insurance Company brought an action pursuant to the Bankruptcy Code, *see* 11 U.S.C. §§ 503 and 506(c) (1994), against Magna Bank,[1] a secured creditor of Hen House Interstate, Inc. (hereinafter "Debtor"), the debtor in the underlying bankruptcy. Hartford sought the payment of workers' compensation insurance premiums that went unpaid by the Debtor during the period in which the Debtor attempted a Chapter 11 reorganization. The Bankruptcy Court[2] ordered the surcharge of Magna's collateral pursuant to § 506(c) to secure payment of the insurance premiums, and the District Court[3] affirmed. Magna appeals.

Magna contends that Hartford lacked standing to bring its claim under § 506(c), that Magna's collateral may not be surcharged on the basis that it agreed to the continuation of the Debtor's business, that the judgment constitutes an impermissible modification of the original financing order, and that the equities favor denying the surcharge of Magna's collateral. We affirm.

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1. Magna Bank is the successor in interest to the rights, claims, and interests of Landmark Bank of Illinois. We refer to Magna herein notwithstanding that certain facts pertain to Landmark Bank prior to its acquisition by Magna.

2. The Honorable David P. McDonald, United States Bankruptcy Judge for the Eastern District of Missouri.

3. The Honorable Charles A. Shaw, United States District Judge for the Eastern District of Missouri.

I.

The Debtor owned and operated a number of businesses located throughout the Midwest, including restaurants, service stations, gift stores, and an outdoor advertising firm. On September 5, 1991, the Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code. During the course of its Chapter 11 case, the Debtor remained in possession of its assets and continued to operate its businesses. Ultimately, the Debtor's efforts to reorganize were unsuccessful and, while still operating under Chapter 11, the Debtor liquidated its assets through a combination of going-concern sales and sales of its shut-down properties. Thereafter, in January 1993, the Debtor's Chapter 11 case was converted into a Chapter 7 liquidation proceeding.

At the time the Debtor initially filed for bankruptcy relief, it owed Magna approximately $4.1 million. As security for repayment of the debt, Magna had a security interest in essentially all of the Debtor's real and personal property. The day after the Debtor filed its Chapter 11 petition, Magna agreed to loan the Debtor $300,000 to help finance the Debtor's reorganization efforts. The Debtor moved for authorization of the post-petition loan. In its financing order, to which both Magna and the Debtor agreed, the Bankruptcy Court granted the motion authorizing the loan and, in addition, authorized the Debtor's use of cash collateral that was subject to Magna's security interest to pay expenses set forth in an attached budget. *See* Final Order para. 24, at 17. The budget provided for workers' compensation expenses in the amount of approximately $8,600 per month. Further, the financing order required that the Debtor "pay or cause

to be paid all ordinary and necessary expenses of operation . . . which are allowed in the Budget." Final Order para. 25, at 18. The financing order also contained a provision that "no expenses of administration of Debtor's Chapter 11 case . . . shall be charged against [Magna] or [its collateral] . . . pursuant to § 506(c) of the Bankruptcy Code . . . without the prior written consent of [Magna], and no such consent shall ever be implied." Final Order para. 33, at 24-25. After entry of the financing order, Magna disbursed the entire $300,000 to the Debtor.

During the period in which the Debtor attempted its Chapter 11 reorganization, Hartford provided workers' compensation insurance coverage. Under the terms of the policy, the Debtor was required to make monthly payments to Hartford. Despite the fact that the Debtor quit paying the monthly premiums, Hartford continued to provide coverage. At one point, the Debtor paid a portion of the amount due Hartford, but to date $51,871.40 remains in unpaid premiums for the period in which Hartford provided the coverage. Hartford filed for relief pursuant to 11 U.S.C. § 503 seeking the allowance of its claim as an administrative expense and 11 U.S.C. § 506(c) seeking to recover its claim by surcharging Magna's collateral.

II.

"As the second reviewing court, our standards are the same as the district court's; we review the bankruptcy court's findings of fact for clear error and its conclusions of law *de novo*." *Halverson v. Estate of Cameron (In re Mathiason)*, 16 F.3d 234, 235 (8th Cir. 1994). Magna first urges this Court

to reconsider and overrule our prior decision, *United States, Internal Revenue Service v. Boatmen's First National Bank of Kansas City*, 5 F.3d 1157, 1159 (8th Cir. 1993), wherein we held that third parties have standing to surcharge a secured creditor's collateral under § 506(c).[4] Section 506(c) provides, "The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." 11 U.S.C. § 506(c). In *Boatmen's*, we interpreted this provision to allow administrative claimants to assert their claims under § 506(c). As a three judge panel, we lack authority to reconsider *Boatmen's*, *see Smith v. Copeland*, 87 F.3d 265, 269 (8th Cir. 1996) ("Only the court en banc can overrule another panel's decision."), and therefore hold that Hartford had standing under § 506(c) to assert its administrative claim for unpaid workers' compensation insurance premiums.

Magna next contends that the Bankruptcy Court and the District Court erred in allowing Hartford to surcharge Magna's collateral under § 506(c). Generally, administrative expenses may not be charged against secured collateral but instead share in the distribution of the unsecured collateral pursuant to 11 U.S.C. § 503. *See Boatmen's*, 5 F.3d at 1159. Section 506(c) creates an exception to this general rule,

4. As a member of the panel, I dissented from the decision in *United States, Internal Revenue Service v. Boatmen's First National Bank of Kansas City*, 5 F.3d 1157 (8th Cir. 1993), because the plain language of 11 U.S.C. § 506(c) gives only the trustee standing to surcharge a secured creditor's collateral. *See id.* at 1161. I remain of that view today but recognize *Boatmen's* as controlling precedent in this Circuit.

providing that an expense may be surcharged against a secured creditor's collateral if the expenditure was necessary, reasonable, and directly benefited the secured creditor. *See Brookfield Prod. Credit Ass'n v. Borron*, 738 F.2d 951, 952 (8th Cir. 1984). In the alternative, a secured party's collateral may be surcharged where the secured party either directly or impliedly consented to the expense. *See Daniel v. AMCI, Inc. (In re Ferncrest Court Partners, Ltd.)*, 66 F.3d 778, 782 (6th Cir. 1995).

Magna does not dispute that workers' compensation insurance is a necessary and reasonable expense. Magna does contend, however, that the expense incurred by Hartford in providing workers' compensation insurance did not directly benefit Magna because the Debtor's reorganization efforts ultimately failed and the assets were liquidated. For support, Magna relies on the Bankruptcy Court's statement that "the continued operation of the business failed to improve [Magna's] recovery." Bankruptcy Ct. Mem. Op. at 9. The District Court, however, did not clarify whether it viewed Magna as having received a direct benefit. In any event, while we would be inclined to view Magna as having received a direct benefit, *see Boatmen's*, 5 F.3d at 1160 ("The 'benefit' . . . lies in the *ambition* of the creditor to preserve and improve its secured collateral and the *opportunity* to realize that ambition.") (emphasis added), we need not reach that holding today because we conclude that Magna consented to the workers' compensation insurance expenses.

We believe that the case at bar is in all material aspects similar to *Boatmen's*. In *Boatmen's*, a company that owned and operated a string of dry cleaning stores filed for Chapter

11 bankruptcy. A secured creditor, Boatmen's Bank, agreed to extend post-petition credit so that the debtor company could continue its operations. During the time in which the debtor operated under Chapter 11, its payroll taxes went unpaid. The Internal Revenue Service (IRS) filed an administrative claim pursuant to § 506(c) to recover the unpaid payroll taxes plus interest and penalties. We held that "when a secured creditor agrees to the preservation of the debtor business as a going concern and that preservation requires the payment of payroll taxes, any unpaid post-petition taxes may be charged to the secured collateral." *Boatmen's*, 5 F.3d at 1160.

We have essentially the same set of circumstances here. Magna agreed to the continued operation of the Debtor's businesses in the hopes of receiving a greater return through reorganization rather than through liquidation. Magna thereby "agreed to accept the expenses and risks associated with [the] anticipated benefit." *Id.* One such expense is workers' compensation insurance. Under Missouri law, an operating business is obligated to maintain workers' compensation insurance unless it can demonstrate that it has the ability to self-insure. *See* Mo. Rev. Stat. § 287.280 (Supp. 1998). Moreover, Magna expressly consented in the financing order to the provision authorizing the Debtor's use of its cash collateral for necessary operating expenses, which specifically included workers' compensation insurance premiums, and to the provision requiring that the Debtor pay or cause to be paid all necessary and ordinary expenses.

Magna attempts to distinguish in two ways the facts in *Boatmen's* from those in the present case. First, Magna points

to the fact that in *Boatmen's* the bank had signed an agreement to subordinate its post-petition liens to administrative expenses. Magna thus argues that Boatmen's expressly consented to the surcharge of its collateral for administrative expenses. Magna also points out that this Court in *Boatmen's* found that the bank had received an overall benefit from the debtor's efforts at reorganization. Magna therefore contends that there may have been other sufficient grounds upon which this Court could have allowed the IRS to surcharge Boatmen's collateral. The holding of *Boatmen's*, however, turns neither on Boatmen's agreement to subordinate its liens to administrative expenses nor on the receipt of any direct benefit by Boatmen's. Rather, the holding turns on Boatmen's agreement to the preservation of the debtor's business as a going concern. We find neither attempt to distinguish *Boatmen's* persuasive. Just as in *Boatmen's*, Magna agreed to the continued operation of the Debtor's businesses and therefore consented to the payment of workers' compensation insurance.

In further support of Magna's argument that it did not consent to the payment of workers' compensation insurance, Magna directs us to the provision contained in the financing order, which provides that "no expenses of administration of Debtor's Chapter 11 case . . . shall be charged against [Magna] or [its collateral] . . . pursuant to § 506(c) of the Bankruptcy Code . . . without the prior written consent of [Magna], and no such consent shall ever be implied." Final Order para. 33, at 24-25. This provision, however, does not affect our conclusion that Magna *did* consent to the use of its cash collateral for expenses associated with keeping the Debtor's businesses operating. Furthermore, we believe that

an agreement by a debtor and a secured creditor to prohibit the payment of § 506(c) administrative expenses from the secured creditor's collateral would operate as a windfall to the secured creditor at the expense of administrative claimants. We therefore conclude that such a provision is unenforceable. *See McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (W.D. Mich. 1991) ("[A] provision [that attempts to immunize a secured creditor from surcharge payment obligations under § 506(c)] is not enforceable in light of the congressional mandate that a trustee have the authority to use a portion of secured collateral for its preservation or proper disposal."); *see also In re Willingham Invs., Inc.*, 203 B.R. 75, 79 (Bankr. M.D. Tenn. 1996).

Magna next asserts that the Bankruptcy Court's order constitutes an impermissible modification of the original financing order in violation of 11 U.S.C § 364(e), which provides:

> The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt . . . does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith . . . .

11 U.S.C. § 364(e). The purpose of § 364(e) is to encourage the extension of credit to debtors by permitting creditors to rely on a bankruptcy court's authorization of the transaction. *See Burchinal v. Central Washington Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1488 (9th Cir. 1987). Magna

argues that, because the financing order contained the provision against surcharging Magna's collateral without its consent, the decision by the Bankruptcy Court violates § 364(e). This argument fails, however, because we have concluded above that Magna consented to the payment of workers' compensation insurance premiums by agreeing to the continued operation of the Debtor's businesses. The Bankruptcy Court did not modify or reverse any provision contained in the financing order.

Finally, Magna argues that a surcharge of its collateral in this situation would be grossly inequitable. For support, Magna asserts that the payments already made to Hartford by the Debtor will cover any existing or future claims that may be asserted under the workers' compensation policy and that Hartford could have minimized its exposure by canceling the policy when the premiums first went unpaid. We find neither of these assertions compelling enough to justify a finding that the Bankruptcy Court abused its discretion.

III.

The order of the District Court, affirming the order of the Bankruptcy Court, is affirmed.

Opinion Dated July 27, 1998

HANSEN, Circuit Judge, concurring.

I concur in the court's opinion because, like Chief Judge Bowman, I must respect as controlling circuit precedent the panel decision in *United States, Internal Revenue Service v. Boatmen's First National Bank of Kansas City*, 5 F.3d 1157 (8th Cir. 1993). I agree with the Chief Judge's view first expressed his dissent in *Boatmen's* and reiterated today in footnote four of the court's opinion, that the plain language of 11 U.S.C. § 506(c) gives only a trustee standing to surcharge a creditor's collateral, but that is not the current law of this circuit, and only an en banc court can, and in my view, should, change it.

ORDER
Sept. 22, 1998

Appellant Magna Bank's suggestion for rehearing is granted. The court's opinion and judgment of July 27, 1998, are vacated. The grant of rehearing en banc is limited to the issue of standing.

The clerk is directed to set this case for oral argument at 10:00 a.m. on Thursday, October 22, 1998, in St. Paul, Minnesota. Each side will be granted twenty (20) minutes to present its oral argument.

The parties are directed to submit twenty-five (25) copies of the briefs previously filed in the appeal. These additional copies are due October 2, 1998.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED JUNE 7, 1999

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 97-3859

In re: Hen House Interstate, Inc.,

Debtor.

Hartford Underwriters Insurance Company,

Movant – Appellee,

v.

Magna Bank, N.A., formerly known as Magna Bank of Illinois, N.A.,

Respondent – Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: October 22, 1998

Filed: June 7, 1999

Before BOWMAN,[1] Chief Judge, HEANEY, McMILLIAN, RICHARD S. ARNOLD, FAGG, WOLLMAN, BEAM,

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1. The Honorable Pasco M. Bowman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the end of the day on April 23, 1999. He has been succeeded by the Honorable Roger L. Wollman.

Opinion Dated June 7, 1999

LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges, *en banc*.

BOWMAN, Chief Judge.

Magna Bank, N.A., appeals the judgment of the District Court affirming the judgment of the Bankruptcy Court in favor of Hartford Underwriters Insurance Company. The sole question presented for review by the Court en banc is the threshold question of whether Hartford has statutory standing to surcharge Magna's collateral under 11 U.S.C. § 506(c) (1994). We reverse.

I.

Magna[2] made various loans to Hen House Interstate, Inc. (Debtor), which owned and operated a number of restaurants, service stations, gift stores, and an outdoor advertising firm. To secure the loans, Magna took a security interest in essentially all of the Debtor's real and personal property. On September 5, 1991, the Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Missouri. When the Debtor filed its petition, it was indebted to Magna in the amount of approximately $4.1 million. The Debtor retained possession of its assets and continued operation of its businesses after commencing the Chapter 11 proceedings.

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2. Magna is the successor in interest to Landmark Bank of Illinois. We refer to Magna herein notwithstanding that some of the facts pertain to Landmark Bank prior to its acquisition by Magna, and notwithstanding that on October 9, 1998 Magna was absorbed by merger into Union Planters National Bank.

Opinion Dated June 7, 1999

The day after the Debtor filed its Chapter 11 petition, Magna agreed to lend the Debtor an additional $300,000 to help finance the Debtor's post-petition reorganization efforts. The Bankruptcy Court approved the loan agreement in its final financing order and authorized the Debtor to use the proceeds of the post-petition loan and the cash collateral that was subject to Magna's security interest to pay expenses set forth in an appended budget. The budget allowed for workers' compensation expenses in the amount of approximately $8600 per month. Upon approval of the loan agreement, Magna disbursed the entire $300,000 of loan proceeds to the Debtor.

Despite the additional financing provided under the post-petition loan agreement, the Debtor's attempts at reorganization failed. In January 1993, the Bankruptcy Court converted the Debtor's Chapter 11 case into a Chapter 7 liquidation proceeding and appointed a trustee of the Chapter 7 estate.

During the Debtor's attempted Chapter 11 reorganization, Hartford provided workers' compensation insurance coverage to the Debtor. The terms of the insurance policy required the Debtor to pay a premium to Hartford each month. The Debtor made an initial premium deposit and a subsequent premium payment, but otherwise failed to pay the monthly premium required by the policy. The unpaid premiums amount to $51,871.40.

When the Chapter 11 reorganization failed and the Debtor's case was converted to a Chapter 7 proceeding, Hartford brought an action pursuant to Bankruptcy Code § 503 seeking the allowance of its claim as an administrative

expense and Bankruptcy Code § 506(c) seeking to recover the unpaid premiums by surcharging Magna's collateral. The Bankruptcy Court, following the holding of a three-judge panel of our Court in *United States, Internal Revenue Service v. Boatmen's First National Bank*, 5 F.3d 1157, 1159 (8th Cir. 1993), that non-trustees have standing under § 506(c) to surcharge a secured creditor's collateral, determined that Hartford had standing to seek recovery pursuant to § 506(c) and ordered the surcharge of Magna's collateral. Magna appealed to the District Court claiming, *inter alia*, that § 506(c) did not accord Hartford standing to assert its claim. The District Court, also relying on *Boatmen's*, affirmed the judgment of the Bankruptcy Court, and Magna appealed to this Court.

A three-judge panel of this Court affirmed the judgment of the District Court, holding, among other things, that *Boatmen's* was controlling and that Hartford therefore had standing to seek recovery under § 506(c). But two members of the panel expressed their belief that *Boatmen's* had been wrongly decided and should be reconsidered by the Court en banc. *See Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 150 F.3d 868, 871 n.4 (8th Cir. 1998); *id.* at 873 (Hansen, J., concurring). We granted Magna's suggestion for rehearing en banc on the issue of Hartford's standing to seek recovery and vacated the panel opinion. We now overrule *Boatmen's* to the extent it construes § 506(c) to empower a non-trustee to surcharge an allowed secured creditor's collateral under that section and hold that Hartford, a non-trustee claimant, lacks standing to assert a § 506(c) claim.

II.

As the second reviewing court, we apply the same standard as that applied by the District Court; we review de novo the Bankruptcy Court's determination of the single issue of law presented here. *See Halverson v. Estate of Cameron (In re Mathiason)*, 16 F.3d 234, 235 (8th Cir. 1994).

Initially, we note that Hartford asserts no claim against Magna or its collateral outside of the Hen House bankruptcy proceeding. The nature and extent of the potential liability of Magna, as an allowed secured creditor in that bankruptcy proceeding, is established by the Bankruptcy Code; more particularly, it is established for purposes of this case by § 506(c). Despite arguments made by Hartford asserting its § 506(c) standing to surcharge property securing Magna's claim based on other provisions of the Bankruptcy Code, the fact is that § 506(c) is the only provision of the Code that directly addresses the issue of standing that is before us. Moreover, § 506(c) is the only provision of the Code that authorizes any party to a bankruptcy proceeding to recover from property securing the claim of an allowed secured creditor such as Magna. It would be extremely odd were Congress to have expanded the potential § 506(c) liability of allowed secured creditors by means of the other Code provisions put forward by Hartford, which in one way or another deal with the assertion of claims against the bankruptcy estate, as distinguished from claims against the property of allowed secured creditors.[3] We do not believe

3. The general rule is that administrative expenses cannot be charged against secured collateral and are chargeable against only the unsecured collateral of the estate pursuant to Bankruptcy Code (Cont'd)

Congress intended to do any such thing and, therefore, we focus on § 506(c).

Section 506(c) clearly states, "*The trustee* may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." 11 U.S.C. § 506(c) (1994) (emphasis added). The proper construction of any statute, the Bankruptcy Code included, begins with the language of the statute itself. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (construing Bankruptcy Code § 506(b) according to its plain

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(Cont'd)
§ 503. *See* 11 U.S.C. § 503(a) (1994); *Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 324 (3d Cir. 1995); *In re Swann*, 149 B.R. 137, 143 (Bankr. D.S.D. 1993). Therefore, Hartford, despite its argument to the contrary, may not seek to surcharge Magna's collateral under § 503 and may look only to § 506(c) for that purpose.

Hartford seeks standing under Bankruptcy Code § 1109(b) as well, *see* 11 U.S.C. § 1109(b) (1994) ("A party in interest, including . . . a creditor . . . may raise and may appear and be heard on any issue in a case under this chapter."), but § 1109(b) is not the correct avenue for recovery for the reason that § 1109(b) is inapplicable to the Chapter 7 proceeding which underlies this case. *See in re Taylor & Assocs., L.P.*, 191 B.R. 374, 381-82 n.5 (Bankr. E.D. Tenn. 1996) ("Section[ ] 1109 . . . [is] applicable exclusively to Chapter 11 cases and ha[s] no application to Chapter 7."); *cf. In re Polo Club Apartments Assocs. L.P.*, 150 B.R. 840, 856-57 (Bankr. N.D. Ga. 1993) (noting that subchapter I of Bankruptcy Code Chapter 11 applies only in cases Under Chapter 11, and does not apply to a case converted from Chapter 11 to Chapter 7).

language); *Harmon v. United States*, 101 F.3d 574, 583 (8th Cir. 1996). The natural reading of § 506(c) entitles only the trustee to seek to surcharge property securing the claim of an allowed secured creditor under that section.[4] When the language of the Bankruptcy Code is clear and unambiguous, "our sole function . . . is to enforce it according to its terms." *Rake v. Wade*, 508 U.S. 464, 471, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993) (internal quotations and citations omitted) (interpreting "unqualified terms" of Bankruptcy Code § 506(b)); *see also Patterson v. Shumate*, 504 U.S. 753, 761, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992) (stating clarity of § 541(e)(2) of Bankruptcy Code obviates need for inquiry beyond language of statute).

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4. Hartford has made an issue of Bankruptcy Code § 1107(a), which provides that Chapter 11 debtors in possession shall, with some exceptions, have "all the rights . . . and powers, and shall perform all the functions and duties," of trustees. 11 U.S.C. § 1107(a) (1994). The express language of § 1107(a) therefore compels the unremarkable conclusion that Chapter 11 debtors in possession may do most of the things trustees may do. In this case, Hartford is neither a Chapter 11 debtor in possession nor a bankruptcy trustee.

Likewise, though Bankruptcy Code §§ 901, 902 and 1203 explicitly grant municipalities in Chapter 9 cases and family farmers in Chapter 12 cases some of the rights, powers, functions and duties of trustees serving in cases under Chapter 11, *see* 11 U.S.C. §§ 901(a), 902(5), 1203 (1994), this is not a Chapter 9 or 12 case and Hartford is not a municipality or a family farmer seeking to reorganize. That Congress chose to expressly grant the enumerated parties carefully circumscribed trustee status in limited circumstances demonstrates only that, had Congress intended a claimant such as Hartford to have § 506(c) standing in the present circumstance, it would have said so. Particularly appropriate here is the ancient canon stating that *expressio unius est exclusio alterius*.

Hartford correctly points out that our conclusion here is not the consensus of the circuits that have considered the issue. A majority of those circuits has held that § 506(c) grants standing to non-trustees to pursue surcharge claims under that section. *See Loudoun Leasing Dev. Co. v. Ford Motor Credit Co. (In re K & L Lakeland, Inc.)*, 128 F.3d 203, 206 (4th Cir. 1997) (listing cases). But each of the circuits arriving at a conclusion contrary to the one we reach today has done so by circumventing the plain language of the statute and resting its determination instead upon policy considerations and equitable concerns. *See In re Parque Forestal, Inc.*, 949 F.2d 504, 511-12 (1st Cir. 1991) ("[The] courts of appeals which have considered the question have permitted recovery by third parties who equitably come to stand in the trustee's shoes."); *Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995) ("Although § 506(c) in terms refers only to recovery by the trustee, we . . . have held that administrative claimants other than trustees have standing to recover under § 506(c), particularly when no other party has an economic incentive to seek recovery on the claimant's behalf."); *New Orleans Pub. Serv., Inc. v. First Fed. Sav. & Loan Ass'n (In re Delta Towers, Ltd.)*, 924 F.2d 74, 76-77 (5th Cir. 1991) ("Despite the seemingly unambiguous language, courts have allowed a [non-trustee] claimant to use § 506(c) . . . ."); *North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229, 232 (9th Cir. 1991) ("No compelling policies are served by a restrictive reading of § 506(c) . . . ."), *cert. denied*, 506 U.S. 821, 113 S.Ct. 71, 121 L.Ed.2d 37 (1992). Policy considerations and equitable concerns, however, are impermissible bases for statutory interpretation when, as

here, the language of the statute is clear and unambiguous. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 540, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (eschewing policy determinations for which the Bankruptcy Code gives no authority); *McCuskey v. Central Trailer Servs., Ltd.*, 37 F.3d 1329, 1332 (8th Cir. 1994) (declining trustee's invitation to turn to bankruptcy policy considerations to guide interpretation of plain language of Bankruptcy Code § 546(a)(1)). "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988). We therefore respectfully disagree with those circuits holding that § 506(c) grants non-trustees standing to seek recovery under that section.

More persuasive is the determination of the Court of Appeals for the Fourth Circuit that "[t]he language of § 506(c) is clear and unambiguous. It grants only trustees the authority to seek recovery of postpetition costs and expenses from the collateral of a secured creditor." *Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 484 (4th Cir. 1994); *see also K & L Lakeland*, 128 F.3d at 206-07.

Moreover, although we base our holding on the plain language of § 506(c), we note that the position espoused by Hartford would undermine the carefully crafted equality-of-distribution scheme fundamental to the operation of the Bankruptcy Code. *See Begier v. IRS*, 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code."). Entirely consistent with this scheme is 506(c)'s

grant of standing to a bankruptcy trustee to recover administrative expenses from the property securing the claim of an allowed secured creditor, the proceeds of which recovery become a portion of the bankruptcy estate and are distributed pro rata among creditors according to their relative priorities. In contrast, the result of the position urged by Hartford would be that the administrative expenses recovered by a non-trustee claimant would not be incorporated into the bankruptcy estate or otherwise contributed to appropriate distribution of the debtor's property among its creditors. Such a result would be incompatible with the fundamental equal distribution goals of the Bankruptcy Code. In addition, as the Fourth Circuit suggested in *JKJ Chevrolet*, to allow non-trustee claimants (other than the debtor) to bring § 506(c) claims is to invite "a flood of satellite litigation by those seeking to avoid a pro rata division of the estate." 26 F.3d at 484 n.6 (citing *Boyd v. Dock's Corner Assocs. (In re Great N. Forest Prods., Inc.)*, 135 B.R. 46, 69 (Bankr. W.D. Mich. 1991)).

Finally, for the first time in this litigation Hartford asserts standing under Federal Rule of Bankruptcy Procedure 7071 to enforce the terms of the final financing order of the Bankruptcy Court. *See* Fed. R. Bankr. P. 7071 (incorporating Fed. R. Civ. P. 71) ("When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party . . . ."). The final financing order directs the Debtor to pay expenses out of cash collateral covered by Magna's security interest. *See In re Hen House Interstate, Inc.*, No. 91-45623-293, para. 24, at 17 (Final Order of Bankruptcy Court). Rule 7071, however, was not the basis of the claim

asserted by Hartford in its application to the Bankruptcy Court, in which Hartford sought to surcharge Magna's collateral pursuant to Bankruptcy Code § 506(c). Having stated only a § 506(c) surcharge claim in its complaint and throughout this litigation, Hartford cannot now, after the case has come to the rehearing en banc stage in this Court, embark upon a different claim never pleaded to the Bankruptcy Court and assert that any standing to bring that claim is a ground for standing in the § 506(c) claim it actually brought. That Hartford might or might not have standing to bring a Rule 7071 claim is beside the point, for that is a new claim that cannot initially be brought forward at the appellate level.[5]

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5. Moreover, the Rule 7071 claim is not within the scope of our order granting "rehearing en banc . . . limited to the issue of standing." *Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, No. 97-3859EMSL (8th Cir. Sept. 22, 1998) (Order Granting Rehearing En Banc). Although our order (the purpose of which, after all, was to limit rehearing to a single issue, not to invite new claims) refers generically to "the issue of standing," we could only have intended that phrase to mean the issue of § 506(c) standing. In its motion to file a supplemental brief after rehearing en banc had been granted, Hartford made no reference to Rule 7071. Instead, Hartford emphasized that "[t]he question of standing under section 506(c) is one of great importance to administrative claimants such as Hartford, and the Court's en banc resolution of this issue will affect many such claimants in innumerable bankruptcy cases." Appellee's Motion to File Supplemental Brief at 2-3 (Sept. 22, 1998). Likewise, Magna, in its suggestion for rehearing en banc, limited discussion to § 506(c). For these reasons, it strains credulity to think that our order granting rehearing en banc invited Hartford to assert a Rule 7071 claim at this late stage. We are thoroughly satisfied that our review is limited to the issue of Hartford's standing to bring a § 506(c) claim, the claim that Hartford in fact asserted.

We therefore do not reach the issue of Hartford's standing to bring a Rule 7071 claim. *Cf. Stupak-Thrali v. United States*, 89 F.3d 1269, 1275 n.4 (6th Cir. 1996) (declining to hear issue urged for first time to panel in reply brief and reasserted in supplementary brief to court en banc; otherwise party raising argument on en banc rehearing would "be allowed to deprive the panel of the ability to address the issue first"), *cert. denied*, 519 U.S. 1090, 117 S.Ct. 764, 136 L.Ed.2d 711 (1997); *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 397 (1st Cir.) (order denying rehearing) (holding party who failed to assert argument in district court, and in supplemental briefing and oral argument before panel, "cannot be permitted to raise a new issue for the first time on petition for rehearing in the court of appeals"), *cert. denied*, 498 U.S. 891, 111 S.Ct. 233, 112 L.Ed.2d 193 (1990).

The single issue for determination by this Court en banc remains the issue stated at the outset: whether Hartford has standing under § 506(c). We hold that § 506(c) permits only the trustee to proceed under that section. Hartford therefore lacks standing to surcharge Magna's collateral under § 506(c).

III.

United States, Internal Revenue Service v. Boatmen's First National Bank, 5 F.3d 1157 (8th Cir. 1993), which held that parties other than the trustee have standing to surcharge property securing the claim of an allowed secured creditor under § 506(c), is overruled. The decision of the District Court is reversed. The case is remanded to the District Court with instructions that the Bankruptcy Court be directed to vacate its judgment and dismiss Hartford's § 506(c) claim for lack of standing.

HEANEY, Circuit Judge, dissenting, with whom MCMILLIAN, RICHARD S. ARNOLD, BEAM, and MURPHY, Circuit Judges, join.

Today this court rejects the view of four other circuits, ignores the teaching of the leading bankruptcy treatise, and departs from the well-established view that administrative claimants have § 506(c) standing to enforce administrative claims against secured creditors who have benefitted by the goods or services provided by an administrative claimant. Because the prudential standing doctrine requires this court to confer § 506(c) standing to Hartford, I respectfully dissent.

An administrative expense may be surcharged against a secured creditor's collateral if the expense was necessary, reasonable, and directly benefitted the secured creditor, *Brookfield Prod. Credit Ass'n v. Borron*, 738 F.2d 951, 952-53 (8th Cir. 1984), or if a secured party either directly or impliedly consented to the expense, *Daniel v. AMCI, Inc. (In re Ferncrest Court Partners)*, 66 F.3d 778, 782 (6th Cir. 1995). The original panel opinion stated that

> Magna agreed to the continued operation of the Debtor's businesses in the hopes of receiving a greater return through reorganization rather than through liquidation. Magna thereby "agreed to accept the expenses and risks associated with [the] anticipated benefit." One such expense is workers' compensation insurance. Under Missouri law, an operating business is obligated to maintain workers' compensation insurance unless it can demonstrate that it has the ability to self-insure. See Mo. Rev. Stat. § 287, 280 (Supp. 1998).

Hartford Underwriters Ins. Co. v. Magna Bank (In re: Hen House Interstate, Inc.), 150 F.3d 868, 872 (8th Cir. 1998) (quoting *IRS v. Boatmen's First National Bank*, 5 F.3d 1157, 1160 (8th Cir. 1993)). The original panel further held that "Magna consented to the workers' compensation insurance expenses," and proceeded to the issue of standing. *Hartford*, 150 F.3d at 871. The panel concluded that Hartford had standing under *Boatmen's*. *See id.* at 871. This court granted Hartford's petition for rehearing solely on the issue of standing.

I agree with the court that the sole issue before us is whether Hartford has standing to surcharge Magna's collateral. I believe it has. Four circuits have adopted this view, *See e.g. North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229, 232 (9th Cir. 1991), *cert. denied*, 506 U.S. 821, 113 S.Ct. 71, 121 L.Ed.2d 37 (1992); *In re Parque Forestal, Inc.*, 949 F.2d 504, 511 (1st Cir. 1991); *New Orleans Pub. Serv., Inc. v. First Fed. Sav. & Loan Ass'n (In re Delta Towers, Ltd.)*, 924 F.2d 74, 77 (5th Cir. 1991); *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91, 94 (3d Cir. 1986). The court's view is also supported by the leading scholarly work on bankruptcy:

> The reasoning behind the approach which extends standing to creditors and other claimants is that a secured creditor who received a direct benefit from the rendition of services or provision of goods by an administrative claimant . . . should have the collateral charged for that benefit, regardless of whether the proceeds of the charge are paid to the trustee in reimbursement for the trustee's prior payment to the claimant, or are paid to the claimant directly. Otherwise, if the trustee does not have available funds to pay the claimant, the trustee has no economic incentive to seek a recovery under section 506(c) with respect to amounts that will be paid over to the claimant. As a result, the secured creditor may obtain a windfall at the expense of the unpaid claimant.

4 Collier on Bankruptcy ¶ 506.05[8] at 506-142-43 (Lawrence P. King ed., 15th ed. 1998). The majority view has been in effect since 1986, and I believe that Congress has acquiesced to the majority's resolution of the conflict. *See Johnson v. Transportation Agency*, 480 U.S. 616, 629 n.7, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987).

Had Congress intended to limit § 506(c) standing to trustees, it could have included the word "only" in the statute. Because it failed to do so and because Congress did not expressly deny § 506(c) standing to administrative claimants, the prudential standing doctrine dictates that this court confer § 506(c) standing on Hartford.

Any determination of standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). In addition to the threshold requirements of Article III, the applicable prudential standing requirement is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute." *Data Processing Serv. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). While Congress

can limit standing beyond that allowed by Article III of the United States Constitution, "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest . . . ." *Id.* at 154, 90 S.Ct. 827. While *Data Processing* applied the zone-of-interests test to suits under the Administrative Procedure Act, the Supreme Court has since listed it among the other generally applicable prudential standing requirements. *See Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). Where Congress has neither expressly allowed nor denied administrative claimants § 506(c) standing, the Supreme Court has held that "Congress legislates against the background of our prudential standing doctrine, which applies *unless it is expressly negated*." *Id.* at 163, 117 S.Ct. 1154 (emphasis added); *see also Data Processing*, 397 U.S. at 154, 90 S.Ct. 827 ("Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise").

There can be no doubt that Hartford has Article III standing, and because Congress has not expressly negated the prudential standing doctrine in § 506(e), Hartford also has § 506(c) standing. To satisfy Article III standing, a plaintiff must allege that (1) he or she suffered or imminently will suffer an injury in fact; (2) the injury is fairly traceable to the defendant's conduct; and (3) a favorable court decision is likely to redress the injury. *See Florida Gen. Contractors v. Jacksonville*, 508 U.S. 656, 663-64, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993) (citations omitted). Here, Hartford provided statutorily-required workers' compensation insurance and was not paid. Magna consented to the court-authorized expenditures and benefitted from them in two

ways. First, Magna benefitted from the heightened possibility it would recoup the full value of its security interest. Second, it benefitted insofar as liquidating the various businesses as going concerns optimized its profit from liquidation. Finally, a favorable decision to Hartford would undoubtedly redress its injury.

Having satisfied the general requirements for Article III standing, "the applicable prudential standing requirement [is] 'whether the interest sought to be protected by [Hartford] is *arguably* within the zone of interests to be protected or regulated by the statute.' " *Bennett*, 520 U.S. at 162, 117 S.Ct. 1154 (citing *Data Processing*, 393 U.S. at 153, 90 S.Ct. 827) (emphasis added). "The [zone-of-interests] test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987) (footnote omitted). Section 506(c) provides that "[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim. 11 U.S.C. § 506(c). Here, it is clear that Hartford's claim was reasonable and necessary. Indeed, the continuance of workers' compensation insurance was mandated by law if Hen House was to continue in business. Additionally, the expenditures benefitted Magna as discussed above. Finally, Hartford's § 506(c) standing is consistent with other provisions of the Bankruptcy Code. *See, e.g.*, 11 U.S.C. §§ 503(a), 1109(b).

The court joins the Fourth Circuit[6] in its assertion that conferring § 506(c) standing to administrative claimants circumvents the Bankruptcy Code's distribution scheme:

> Allowing a claimant to proceed directly against a secured creditor would circumvent this distribution scheme, potentially causing an inequitable division of the estate. For example, if an estate has no unencumbered assets, an administrative claimant recovering directly from a secured creditor might receive full reimbursement while other administrative claimants, whose services were also necessary to the preservation of the estate, would receive nothing. An administrative claimant proceeding against a secured creditor in effect would be granted priority over the other claimants in its same class. We are of the opinion that if Congress had intended to alter so fundamentally the structure and principles underlying bankruptcy proceedings, it would have done so expressly.

Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.), 26 F.3d 481, 484 (4th Cir. 1994). (footnotes and citations omitted). In my view, Congress

6. While the court relies heavily on the reasoning of the Fourth Circuit, even that court has recognized the fact that a secured creditor should not be able to immunize its windfall under the theory that administrative claimants lack § 506(c) standing. *See Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 485 n.7 (4th Cir. 1994) (recognizing the possibility that "a bankruptcy court could grant derivative standing to a claimant . . . to prosecute a § 506(c) action.").

expressly altered the distribution scheme when it enacted § 506(c). As noted in our *Boatmen's* opinion, administrative expenses are generally paid from the unencumbered assets of the bankruptcy estate rather than secured collateral. *See* 5 F.3d at 1159; *see also In re JKJ Chevrolet, Inc.*, 26 F.3d at 483 (recognizing general rule). Section 506(c) clearly alters the general rule by requiring secured creditors to pay administrative expenses when, *inter alia*, the expenditures benefit the secured creditor. Thus, the obligation created by § 506(c), not the identity of the party enforcing that obligation, alters the distribution scheme.

The court departs from its view that it will not entertain equitable considerations and joins the Fourth Circuit in its argument that conferring § 506(c) standing to administrative claimants will lead to inequitable division of bankruptcy estates because particular administrative claimants may be compensated while other administrative claimants, unsecured creditors, or even secured creditors could go unpaid. Even if this were true, this is a criticism of the obligation created by § 506(c), not of allowing a particular party to enforce that obligation. Congress, not the courts, codified an equitable mechanism in § 506(c) by which a secured creditor may be compelled to reimburse the administrative expenses that preserve or dispose of the secured property to the extent that those expenditures have increased the property's value.

Finally, I believe that Hartford's claim that Federal Rule of Bankruptcy Procedure 7071 provides an independent basis for recovery may properly be considered by this court. The court argues that because Hartford did not raise this claim before the original panel in this case and raised it in the first

instance before this court en banc, we should not consider the claim. In my view, Hartford may be excused from failing to raise the claim before the original panel because the facts of this case fall squarely within the law established in our *Boatmen's* opinion; and as Chief Judge Bowman correctly noted in our original panel opinion, " '[o]nly the court en banc can overrule another panel's decision.' " *Hartford*, 150 F.3d at 871 (quoting *Smith v. Copeland*, 87 F.3d 265, 269 (8th Cir. 1996)). Because we are writing on a clean slate as a court en banc, we may certainly entertain Hartford's claim now.

Federal Rule of Bankruptcy Procedure 7071 incorporates Rule 71 of the Federal Rules of Civil Procedure, which provides: "When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if he were a party . . . ." Fed. R. Civ. P. 71. Hartford argues that the bankruptcy court, with Magna's express consent, directed the debtor to pay the premiums for the workers' compensation insurance that Hartford provided. Because it was the intended beneficiary of the order, Hartford argues that it may recover from Magna under Rule 7071. In the interests of judicial economy, I would hold that, even if Hartford does not have standing under § 506(c), it should recover under Rule 7071.

Today this court overrules six years of Eighth Circuit law, rejects the views of four other circuits, and ignores the teaching of the leading bankruptcy treatise. It does this in disregard of the prudential standing doctrine. For the reasons stated above, I respectfully dissent.

RELEVANT STATUTES

11 U.S.C. § 502

§ 502. Allowance of claims or interests.

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that —

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds —

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of —

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds —

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of —

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief

or such later time as the Federal Rules of Bankruptcy Procedure may provide.

(c) There shall be estimated for purpose of allowance under this section —

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured, the claim of a creditor, to the extent that —

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the

debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and

allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

* * *

11 U.S.C. § 503

§ 503. Allowance of administrative expenses.

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including —

(1)(A) the actual, necessary costs and expenses of its preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case:

(B) any tax —

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by —

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense

relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title; and

(6) the fees and mileage payable under chapter 119 of title 28.

* * *

11 U.S.C. § 506

§ 506. Determination of secured status.

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless —

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

* * *

11 U.S.C. § 507

§ 507. Priorities.

(a) The following expenses and claims have priority in the following order:

Relevant Statutes

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

(2) Second, unsecured claims allowed under section 502(f) of this title.

(3) Third, allowed unsecured claims, but only to the extent of $4,300 for each individual or corporation, as the case may be, earned within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for —

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor;

Relevant Statutes

(4) Fourth, allowed unsecured claims for contributions to an employee benefit plan —

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of —

(i) the number of employees covered by each such plan multiplied by $4,300; less

(ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(5) Fifth, allowed unsecured claims of persons —

(A) engaged in the production or raising of grain, as defined in section 557(b) of this title, against a debtor who owns or operates a grain storage facility,

as defined in section 557(b) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility

— but only to the extent of $4,300 for each such individual.

(6) Sixth, allowed unsecured claims of individuals, to the extent of $1,950 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(7) Seventh, allowed claims for debts to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt —

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for —

(A) a tax on or measured by income or gross receipts —

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment

was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (3) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on —

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise —

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date

of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency), to maintain the capital of an insured depository institution.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(1) of this section arising from

the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

* * *

11 U.S.C. § 1109

§ 1109. Right to be heard.

(a) The Securities and Exchange Commission may raise and may appear and be heard on any issue in a case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the case.

(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders'

committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

* * * *

Dec 23 1999

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Supreme Court, U.S.
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No. 99-409

IN THE

Supreme Court of the United States

HARTFORD UNDERWRITERS INSURANCE COMPANY,

Petitioner,

v.

UNION PLANTERS BANK, N.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does a postpetition administrative creditor in a bankruptcy case have standing under 11 U.S.C. § 506(c) to seek payment of its administrative claim from property of the bankruptcy estate that is encumbered by a secured creditor's lien?

CORPORATE DISCLOSURE STATEMENT

Hartford Fire Insurance Company (the "Parent") owns 100% of the stock of the Petitioner Hartford Underwriters Insurance Company ("Hartford"). The Parent is not publicly held. The Parent is an indirect subsidiary of The Hartford Financial Services Group, Inc., which is a publicly held company. In addition, the Parent is an affiliate of the Hartford Life Insurance Company, which has issued shares to the public.

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DECISIONS BELOW

The unreported decision of the Bankruptcy Court determining that Hartford has the right under 11 U.S.C. § 506(c) to recover its administrative claim from property of the debtor's bankruptcy estate is reprinted in the accompanying Appendix at App. 249a-263a. The unreported decision of the District Court affirming the Bankruptcy Court is reprinted in the Appendix at App. 270a-282a. The panel decision of the United States Court of Appeals for the Eighth Circuit affirming the District Court is reported at 150 F.3d 868 (8th Cir. 1998), and is reprinted in the Appendix at App. 286a-296a. The *en banc* decision of the United States Court of Appeals for the Eighth Circuit determining that Hartford lacks standing to pursue its claim under section 506(c) is reported at 177 F.3d 719 (8th Cir. 1999) and is reprinted in the Appendix at App. 297a-316a. The sole issue decided by the *en banc* Court of Appeals is Hartford's standing to enforce the provisions of section 506(c).

JURISDICTION

Jurisdiction in the Bankruptcy Court was invoked pursuant to 28 U.S.C. §§ 157 & 1334. Jurisdiction in the District Court was invoked pursuant to 28 U.S.C. § 158(a). Jurisdiction in the Court of Appeals was invoked pursuant to 28 U.S.C. §§ 158(d) & 1291. The *en banc* decision of the Court of Appeals for the Eighth Circuit was decided on June 7, 1999. Hartford filed a petition for a writ of certiorari in this matter on September 3, 1999, which petition was docketed on September 8, 1999. The Court granted the petition on November 8, 1999. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

11 U.S.C. § 502(a)

§ 502. Allowance of claims or interests.

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed,

unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

11 U.S.C. § 503(a) & (b)(1)(A)

§ 503. Allowance of administrative expenses.

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including —

> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case: . . . .

11 U.S.C. § 506(c)

§ 506. Determination of secured status.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

11 U.S.C. § 1109(b)

§ 1109. Right to be heard.

(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

STATEMENT OF THE CASE

This matter arises out of the chapter 11 bankruptcy proceedings of Hen House Interstate, Inc. (the "Debtor"), commenced on September 5, 1991 in the United States Bankruptcy Court for the Eastern District of Missouri. Both before and after the Debtor commenced its bankruptcy case, the Debtor operated a number of businesses, including service stations, restaurants, gift stores, and an outdoor advertising firm. (App. 38a). Petitioner Hartford Underwriters Insurance Company ("Hartford") supplied workers' compensation insurance to the Debtor during the first year of its bankruptcy case. (App. 216a). The instant controversy involves the question of whether Hartford has the right under section 506(c) of the Bankruptcy Code, 11 U.S.C. § 506(c), to recover its administrative claim for unpaid insurance premiums from property of the Debtor's bankruptcy estate that is encumbered by Respondent's lien.

Before the Debtor filed for bankruptcy relief, Respondent Magna Bank, N.A. ("Magna")[1] was the Debtor's primary lender, holding a lien on all of the Debtor's real and personal property. (App. 190a-191a). After the Debtor commenced its case, the Debtor sought approval from the bankruptcy court to borrow additional funds from Magna, and also to pay certain administrative claims incurred during the course of the reorganization proceedings. (App. 39a-43a).[2] Magna consented

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1. The Debtor was originally indebted to Landmark Bank of Illinois, which merged with Magna during the course of the proceedings. Similarly, Magna has since merged with Union Planters Bank, N.A. Consistent with the references in the decisions of the courts below, Hartford refers to the Respondent as Magna throughout this brief.

2. During the course of a chapter 11 bankruptcy case, the debtor typically remains in possession of its property as it attempts to reorganize. *See* 11 U.S.C. § 1101(a) (defining the term "debtor in possession" to mean the debtor), § 1107 (prescribing rights, powers and duties of a debtor in possession in a chapter 11 case), and § 1108 (Cont'd)

to the financing, and also to the use of its collateral to pay certain of the Debtor's necessary administrative expenses. (App. 48a). Subsequently, the Bankruptcy Court entered an order authorizing the financing, and likewise entered an order authorizing and directing the Debtor to pay its necessary operating expenses from Magna's collateral. (App. 145a, 178a). The authorized expenses included the insurance premiums owed to Hartford. (App. 160a-161a, 175a). Notwithstanding this order, the Debtor failed to pay in full the premiums due Hartford. (App. 216a-217a, 268a-269a).

The Debtor's attempt to rehabilitate its businesses was not successful, and on January 20, 1993, the bankruptcy court converted the Debtor's case to a liquidation proceeding under chapter 7, at which time Robert J. Blackwell was appointed to serve as chapter 7 trustee. (App. 251a).[3] Before the conversion, however, the Debtor was able to sell a number of its properties as going concerns, and Magna received the proceeds of these sales. (App. 217a, 163a). It is undisputed that, without Hartford's provision of workers' compensation insurance, the Debtor could not have continued to operate. (App. 216a). It is also undisputed that Hartford did not have notice of the Debtor's bankruptcy proceedings until March of 1993, some two months after the conversion of the Debtor's case. (App. 218a).

Hartford commenced the underlying litigation in the Bankruptcy Court to recover its claim for unpaid postpetition

(Cont'd)
(authorizing the debtor in possession to continue to operate its business in a chapter 11 case). A trustee may be appointed in a chapter 11 case for "cause." *See* 11 U.S.C. § 1104(a). No trustee was appointed during the course of the Debtor's chapter 11 proceeding. As discussed below, however, a chapter 7 trustee was appointed after the Debtor's chapter 11 case was converted to a proceeding under chapter 7.

3. See 11 U.S.C. § 1112 (governing conversions of chapter 11 cases to proceedings under chapter 7), § 701 (providing for the appointment of an interim chapter 7 trustee), and § 702 (providing for the election of a permanent chapter 7 trustee).

insurance premiums from the remaining undistributed assets of the Debtor's estate. Hartford sought relief pursuant to 11 U.S.C. § 503, which expressly provides for the allowance of administrative claims against an estate in bankruptcy. (App. 207a). Because all of the estate's property (including all available cash) was encumbered by Magna's lien, and because Magna's claim fully exhausts the value of all of the estate's property, Hartford also sought relief pursuant to 11 U.S.C. § 506(c), which expressly provides for the payment of allowed administrative claims from a secured creditor's collateral to the extent that the incurrence of the expense provided a benefit to the secured party. (App. 207a).[4]

The bankruptcy court allowed Hartford's claim under section 503, and likewise ruled that Hartford could recover payment from property encumbered by Magna's lien under section 506(c). (App. 261a). In reaching its decision, the bankruptcy court relied on *United States, Internal Revenue Service v. Boatmen's First National Bank*, 5 F.3d 1157 (8th Cir. 1993), a prior Eighth Circuit decision holding that the United States had the right to pursue an administrative tax claim under section 506(c). (App. 256a-259a). On appeal, the District Court affirmed. (App. 282a).

On further appeal, a three-judge panel of the Eighth Circuit followed *Boatmen's*, and also affirmed Hartford's ability to recover its claim under section 506(c). *See Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 150 F.3d 868, 871-72 (8th Cir. 1998). (App. 290a, 295a). Subsequently, the Court of Appeals granted rehearing *en banc* limited to the issue of Hartford's entitlement to obtain relief under the section (framed as a question of "standing"). *See Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 177 F.3d 719,

4. Hartford did not request the trustee to pursue its claim under section 506(c) because the law in the Eighth Circuit as it existed at that time permitted administrative claimants to pursue such claims on their own behalf. *See United States, Internal Revenue Service v. Boatmen's First Nat'l Bank*, 5 F.3d 1157 (8th Cir. 1993).

721 (8th Cir. 1999) (en banc). (App. 298a). In a split 6-5 decision, the *en banc* court expressly overruled *Boatmen's* and held that Hartford lacks standing to pursue its claim under section 506(c). (App. 300a, 308a). The court concluded that only a trustee (or debtor in possession in a chapter 11 case) has standing to recover payment of an unpaid administrative claim under the section. (App. 303a n.4, 308a). In reaching its conclusion, the court acknowledged that its decision was contrary to the decisions of other courts of appeals. (App. 304a).

SUMMARY OF ARGUMENT

As the courts have recognized, if claimants (such as Hartford) are not permitted to pursue the priority of their own administrative claims under section 506(c), the claims of these parties often will not be pursued at all. *See McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (W.D. Mich. 1991). The present case well illustrates this concern. Here, the chapter 7 trustee has no funds to litigate with Magna because Magna holds a lien on all of the estate's assets, and Magna has refused to consent to the use of its collateral to pay administrative claims that it initially agreed should be paid from its collateral. Moreover, the trustee has no interest in pursing relief under the section against Magna because the trustee has not paid Hartford's claim (he has no unencumbered funds to do so), and thus would only be litigating with Magna on Hartford's behalf to use Magna's collateral to pay Hartford's claim. Trustees in bankruptcy represent the general creditors of the debtor's estate, and have little incentive to use scarce estate assets to litigate against well-funded secured creditors for the benefit of a single claimant. Magna knows this. That is why Magna has fought to establish the precedent that only trustees may pursue relief under section 506(c) — so that Magna may obtain in cases of this kind the very windfall that section 506(c) was intended to prevent. *See North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229, 232 (9th Cir. 1991). Whether because of the disproportionate expense involved in pursuing the matter, a lack of funds, the uncertainty

of the outcome, or simply the trustee's general reluctance to pursue relief on behalf of a single claimant, an unpaid administrative creditor should be entitled to pursue the priority of its claim under the section. *Cf. Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 67 (1992) (observing that "the power to enforce the performance of [a statutory remedy] must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist" (citations and internal quotations omitted)).

As this Court has explained, the established rule of statutory construction applicable in the bankruptcy context (and, hence, in the interpretation of section 506(c)) "is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986). In this instance, section 506(c) was intended to codify prior bankruptcy practice, which included allowing individual administrative claimants to pursue and recover claims of the kind at issue here from a secured party's collateral. *See Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501, 506-07 (1891); *Rabyor v. Franklin Mortgage Co. (In re Rotary Tire & Rubber Co.)*, 2 F.2d 364 (6th Cir. 1924) (insurance premium claim). Because Congress intended section 506(c) to codify preexisting practice, and because nothing in the Bankruptcy Code abrogates the specific rule at issue here, the Court should conclude that Hartford has the right in this case to pursue the priority of its claim under the section.

As this Court has also stated, the Bankruptcy Code should be construed as a whole, not as a collection of unrelated provisions. *See Kelly v. Robinson*, 479 U.S. 36, 43 (1986). In this instance, construction of the Code as a whole demonstrates Hartford's right to pursue the priority of its administrative claim under section 506(c). To begin with, Hartford has the right to enforce the provisions of section 506(c) in accordance with

section 1109(b), which confers broad rights on parties in interest to enforce the provisions of the Code that affect their interests. *See* 11 U.S.C. § 1109(b). In addition, Hartford's right is similarly established by reference to sections 502(a) and 503(a). *See* 11 U.S.C. §§ 502(a) & 503(a).

In reaching a contrary decision, the court below erred by ignoring the overall history and text of the Code, and by construing section 506(c) simplistically in accordance with the maxim "*expressio unius est exclusio alterius*" — the expression of one thing (in a statute) is the exclusion of others — to conclude that Hartford has no right to pursue the priority of its claim under the section because Hartford is not a trustee. (App. 303a n.4). As this Court has warned, the *exclusio* rule is far from dispositive in the construction of statutory provisions. *See Ford v. United States*, 273 U.S. 593, 612 (1927). In this instance, the Code's text and structure demonstrate Hartford's right, and the proper method to use in construing the Code is the Court's approach set forth in *Midlantic*.

Finally, Hartford has the right to pursue the priority of its administrative claim under section 506(c) in accordance with the Court's constitutional and prudential standing doctrines. Hartford's interest in this case lies fully within the zone of interests that Congress sought to protect in enacting section 506(c), and recognizing Hartford's right to pursue the priority of its administrative claim is necessary to vindicate the purpose of the section and likewise prevent Magna from receiving a windfall. Hartford's right also follows from the Court's analogous precedent in *Meyer v. Flemming*, 327 U.S. 161 (1946), which recognized the ability of a party other than a trustee to pursue certain remedies ostensibly assigned to trustees in the bankruptcy process. In this instance, the trustee has neither the incentive nor the ability to pursue the payment of Hartford's claim, and Hartford's pursuit of its claim under section 506(c) would occasion no intrusion on the trustee's role as representative of the estate.

ARGUMENT

When a case is commenced under the Bankruptcy Code,[5] section 541 provides for the creation of a bankruptcy estate consisting of all of the debtor's property wherever located and by whomever held, including property subject to a lien. *See* 11 U.S.C. § 541(a). In addition, the Code establishes that the debtor's monetary obligations constitute "claims" against the estate, subject to adjustment and payment as prescribed by the Code's various allowance and distribution provisions. *See* 11 U.S.C. §§ 101(5), 502(b), & 726. Significantly, the Code provides that parties holding prepetition claims (e.g., monetary obligations incurred before the commencement of the case) are "creditors" of the estate, and that creditors have standing not only to file their own claims with the bankruptcy court, but also to ensure that their claims (as well as the claims of others) are treated in accordance with the Code's rules and regulations. *See* 11 U.S.C. §§ 101(10), 501(a), & 502(a).

After the commencement of a bankruptcy case, the estate may incur postpetition expenses of administration, including "the actual, necessary costs and expenses of preserving the estate . . . ." 11 U.S.C. § 503(b)(1)(A). As section 503(a) makes clear, parties (like Hartford) that provide goods or services to the estate during the course of the bankruptcy proceedings have the right to file a request for payment of their administrative claims from the estate. *See* 11 U.S.C. § 503(a). (App. 207a).[6] Moreover, as a rule, administrative expenses are entitled to payment ahead of prepetition unsecured claims, and administrative claimants have the right to enforce this priority.

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5. 11 U.S.C. § 101 *et seq.* (enacted 1978, effective October 1, 1979).

6. *See* H.R. Rep. No. 95-595, at 355 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6311; S. Rep. No. 95-989, at 66 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5852 (stating that a creditor may file its own administrative claim).

See 11 U.S.C. §§ 507(a)(1), 726(a)(1), & 1129(a)(9)(A).[7] In this instance, it is undisputed that Hartford holds a valid administrative claim within the meaning of section 503 for the workers' compensation insurance premiums that the estate failed to pay.

In addition to prescribing the treatment of administrative claims, the Bankruptcy Code also provides for the determination and treatment of secured claims, such as Magna's claim in this case. As a general rule, secured parties are entitled to receive payment on account of their secured claims equal to the value of their collateral ahead of other types of claims, including administrative expenses. *See United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 378 (1988) (reciting the general rule that "general administrative expenses do not have priority over secured claims").[8] This right, however, is not absolute,[9] and, as is relevant here, section 506(c) states an important exception: to the extent the bankruptcy estate

7. The reason for this priority is straightforward. A bankrupt debtor typically lacks the wherewithal to pay all unsecured claims in full and, unless administrative expenses were entitled to priority treatment, no one would do business with the estate, or undertake to administer the estate on the creditors' behalf. *See Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976).

8. This was also the rule prior to the enactment of the Bankruptcy Code in 1978. *See* 6 Harold Remington, *A Treatise on the Bankruptcy Law of the United States*, § 2606 at 128-29 (5th ed. 1952) (stating that "it is the lienors who are first and primarily entitled to the proceeds from sale of their security"). Under the Bankruptcy Code, section 506(a) provides that the claim of a secured party constitutes a secured claim for bankruptcy purposes to the extent of the value of the secured creditor's interest in the estate's interest in property (e.g., the value of its collateral). *See* 11 U.S.C. § 506(a); *see also Associates Commercial Corp. v. Rash*, 520 U.S. 953, 960 (1997) (explaining the operation of section 506(a)). In this case, Magna's claim exceeds the value of its collateral. As a consequence, there are no unencumbered funds available to pay the claims of other creditors.

9. *See Timbers*, 484 U.S. at 379 ("That secured creditors do not bear one kind of reorganization cost hardly means that they bear none of them.").

incurs an administrative expense that provides a benefit to the secured party in preserving or disposing of the secured party's collateral, the expense may be paid from the collateral ahead of the secured creditor's claim. Specifically, section 506(c) states that "the trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of [the secured] claim." 11 U.S.C. § 506(c).

In context, section 506(c) is merely one of the many provisions of the Bankruptcy Code that specify how property of the estate is to be divided among the various parties to the proceedings (e.g., secured creditors, administrative claimants, unsecured creditors, equity security holders, and others). *See* 11 U.S.C. § 726(a) (specifying priorities of distribution in chapter 7 cases), & § 1129 (specifying the requirements for confirmation of a chapter 11 plan, including the payment of certain claims with certain priorities); *see also* 11 U.S.C. § 1109(b) (defining the phrase "parties in interest"). By its terms, section 506(c) directs plainly that funds that would otherwise be payable to a secured party should be used first to pay qualifying administrative claims. In other words, section 506(c) is a priority provision, prescribing that, under certain defined circumstances, certain administrative claims are to be paid out of a secured party's collateral ahead of the secured party's claim.[10]

10. The nature of section 506(c) as a priority provision is further demonstrated by reference to section 506(b). Section 506(b) provides that "[t]o the extent that an allowed secured claim is secured by property the value of which, *after any recovery under subsection (c) of this section*, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." 11 U.S.C. § 506(b) (emphasis added); *see generally Timbers*, 484 U.S. at 371-73 (explaining the operation of section 506(b)). As the section plainly provides, in order to calculate whether a secured party's claim exceeds the value of its collateral for purposes of the

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As summarized by this Court under the prior law, the basic reason for charging administrative expenses of the kind identified in section 506(c) against the secured party's collateral is essentially an equitable one: "[w]e think it may fairly be held that the [secured] party who takes the benefit of . . . a service ought to pay for it; and that equity may properly decree payment therefor." *Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501, 507 (1891) (equity receivership case); *see also Adair v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 303 U.S. 350, 360-61 (1938); *United States v. Henderson*, 274 F.2d 419, 423 (5th Cir. 1959); *First W. Sav. & Loan Ass'n v. Anderson*, 252 F.2d 544, 548 (9th Cir. 1958); 6 Remington, *supra* note 8, § 2606-08 at 128-35 (discussing the equitable nature of the rule and its application under the former Bankruptcy Act of 1898). As courts have similarly explained in cases under the current Bankruptcy Code, the rule is necessary to prevent a secured party from receiving a windfall by enjoying the benefit of services that enhance its collateral without provision for the payment of those services from the collateral, and, further, that permitting an administrative creditor to enforce the provision is often necessary to vindicate this purpose. *See Architectural Bldg. Components v. McClarty (In re Foremost Mfg. Co.)*, 137 F.3d 919, 923 (6th Cir. 1998) (observing that "[t]he plain purpose of § 506(c) — to prevent unjust enrichment of secured creditors — is one that may be important to parties other than to the trustee, and the trustee's interest may not be significant enough to spur him to act. When courts allow these other parties to seek surcharges, they are improving the probability that the statute's true purpose will be vindicated."); *McAlpine v.*

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section, the court must first deduct from the collateral's value the amount of any right of recovery under section 506(c). The provision thus confirms that claims under section 506(c) are to be paid from a secured party's collateral, and must be taken into account in calculating the secured party's secured claim. *See also supra* note 8 (discussing determination of secured party's claim under section 506(a)).

Comerica Bank-Detroit (In re Brown Bros., Inc.), 136 B.R. 470, 474 (W.D. Mich. 1991) (observing that "[b]ecause the trustee and debtor have no economic incentive to seek . . . recovery [under section 506(c) on behalf of an unpaid administrative claimant in cases in which the estate has not paid the claim], 'the secured creditor may obtain a windfall at the expense of the unpaid claimant' if the Court were not to recognize the claimant's independent right to sue under 506(c)"). As Judge Heaney explained in his dissent in the court below:

> The reasoning behind the approach which extends standing to creditors and other claimants is that a secured creditor who receives a direct benefit from the rendition of services or provision of goods by an administrative claimant . . . should have the collateral charged for that benefit, regardless of whether the proceeds of the charge are paid to the trustee in reimbursement for the trustee's prior payment to the claimant, or are paid to the claimant directly. Otherwise, if the trustee does not have available funds to pay the claimant, the trustee has no economic incentive to seek a recovery under section 506(c) with respect to amounts that will be paid over to the claimant. As a result, the secured creditor may obtain a windfall at the expense of the unpaid claimant.

Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.), 177 F.3d 719, 726 (8th Cir. 1999) (Heaney, J., dissenting) (quoting 4 *Collier on Bankruptcy* ¶ 506.05[8] at 506-142-43 (Lawrence P. King ed., 15th ed. revised 1999)). (App. 310a-311a).

In *Wilson*, this Court recognized an attorney's right in a federal insolvency proceeding to recover directly from a secured party's collateral the cost of legal services that the attorney performed for the bankrupt debtor where the services provided a benefit to the secured party, stating:

> [W]hen he [the receiver] has not acted [to pay a claim], and the question is presented to the court as to the liability of the property for any claim, the court is not foreclosed by the order of appointment [of the receiver governing the receiver's duties], but may consider and determine equitably the extent of liability of the property to such claim, and what its rights or priority may be. Hence, as the receiver did not pay this claim, the parties in interest may rightfully challenge its priority, even if it were within the very letter of the order of appointment of the receiver.

Wilson, 138 U.S. at 506; *see also National Acceptance Co. v. Magill (In re Chapman Coal Co.)*, 196 F.2d 779, 784-85 (7th Cir. 1952) (permitting an administrative claimant to recover directly); *Rabyer v. Franklin Mortgage Co. (In re Rotary Tire & Rubber Co.)*, 2 F.2d 364 (6th Cir. 1924) (same). The narrow issue in this case is whether, in proceedings under the Bankruptcy Code, the Court's rule articulated in *Wilson* still endures.

I. FOR OVER A CENTURY, ADMINISTRATIVE CLAIMANTS HAVE HAD THE RIGHT IN FEDERAL INSOLVENCY PROCEEDINGS TO PURSUE AND RECOVER CLAIMS OF THE KIND SPECIFIED IN SECTION 506(c), AND THIS RIGHT PROPERLY ENDURES UNDER THE BANKRUPTCY CODE.

As this Court has observed, "[w]hen Congress amends the bankruptcy laws, it does not write 'on a clean slate.' " *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (quoting *Emil v. Hanley*, 318 U.S. 515, 521 (1943)). Moreover, as this Court has often repeated, "[w]e . . . 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.' " *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) (quoting *Pennsylvania Dep't of Pub. Welfare v.*

Davenport, 495 U.S. 552, 563 (1990)); *see also Davenport*, 495 U.S. at 565 (O'Connor, J., dissenting) ("This Court carefully has set forth a method for statutory analysis of the Bankruptcy Code. . . . To determine the drafters' intent, the Court presumes that Congress intended to keep continuity between pre-Code judicial practice and the enactment of the Bankruptcy Code in 1978." (citations omitted)). Applying this approach in a series of cases, the Court has indicated time and again that, in construing the provisions of the Code, it will not presume that Congress intended to overturn an established bankruptcy practice *sub silentio*, but will instead require any intent to change the law to be "unmistakably clear." *Cohen*, 523 U.S. at 222.

For example, in *Kelly v. Robinson*, 479 U.S. 36 (1986), the Court addressed the claim that, in enacting section 523(a) of the Code, Congress intended to discharge criminal restitution obligations because these obligations are not specifically excepted from the Code's broad discharge provisions. Recognizing that " 'the starting point in every case involving construction of a statute is the language itself,' " the Court nevertheless explained that "the text is only the starting point," and proceeded to review the matter in light of established practice. *Id.* at 43-44 (citations omitted). After discussing the preexisting rule that criminal obligations were not dischargeable under the former Bankruptcy Act, the Court declined to construe section 523(a) in a manner that would "silently abrogate[ ] . . . [an] exception created by courts construing the old Act." *Id.* at 47. In reaching this conclusion, the Court stated: " 'The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.' " *Id.* (quoting *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986)). Moreover, as the Court further observed, "[t]he Court has followed this rule with particular care in construing the scope of bankruptcy codifications." *Id.* (citations omitted).

Similarly, in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986),

the Court addressed the claim that the plain meaning of section 544 of the Code permits a trustee to abandon contaminated property of the estate regardless of state regulations requiring the handling of the property in ways designed to protect public health and safety. In spite of the absence of any textual restriction on the trustee's power under the section, the Court observed:

> when Congress enacted § 544, there were well-recognized restrictions on a trustee's abandonment power. In codifying the judicially developed rule of abandonment, Congress also presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws. The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.

Id. at 501.

More recently, in *United States v. Reorganized CF&I Fabricators, Inc.*, 518 U.S. 213 (1996), the Court considered whether section 507(a)(7)(E) of the Code, which prescribes a priority for certain taxes, properly embraces its own definition of an excise tax, or must follow the designations of other federal statutes. Recognizing that "a priority provision for taxes [under the bankruptcy law] was nothing new," the Court commenced its analysis with consideration of its own prior precedents under the former Act. *Id.* at 220-21. Adhering to its precedents, the Court concluded that the appropriate interpretation of section 507(a)(7)(E) was to define the phrase "excise tax" as a matter of substantive bankruptcy law. *Id.* at 220. Citing *Midlantic*, the Court stated: "Congress could, of course, have intended a different interpretive method for reading terms used in the Bankruptcy Code it created in 1978. But if it had so intended we would expect some statutory indication. . . ." *Id.* at 221; *see also United States v. Noland*, 517 U.S. 535, 539 (1996)

(following *Midlantic*, and concluding in construing section 510 of the Code that "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific"); *cf. United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 112-13 (1948) ("There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged. Remedial laws are to be interpreted in the light of previous experience and prior enactments.").

The Court's interpretive approach in construing the Bankruptcy Code is compelling. The Code is a codification of equitable principles developed largely by the federal courts in the administration of insolvency proceedings over the past two centuries, and in drafting the Code, Congress has relied repeatedly on preexisting judicial doctrine both to fill out and to inform the Code's essential meaning.[11] Consistent with Congress's reliance on judicial doctrine in crafting the provisions of the Code, the Court's interpretive methodology presumes the continuance of preexisting bankruptcy practices, and, hence, merely conforms to the legislature's approach. Of course, Congress is free to alter or abrogate preexisting legal procedures, even those of longstanding importance and duration (except as the Constitution commands otherwise). Nevertheless, as the Court's analysis in *Kelly*, *Midlantic*, *Cohen*, *Dewsnup*, *Davenport*, *Noland*, and *CF&I* demonstrates, the abrogation of

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11. For example, section 1129(b)(2)(A)(iii) makes use of the term of art "indubitable equivalence." 11 U.S.C. § 1129(b)(2)(A)(iii). As explained in the legislative history, this term derives from *Metropolitan Life Ins. Co. v. Murel Holding Corp. (In re Murel Holding Corp.)*, 75 F.2d 941 (2d Cir. 1935) (L. Hand, J.). 124 Cong. Rec. 32,407, 34,007 (1978); *see also United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 378 (1988) (discussing derivation of "indubitable equivalence" term of art); *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 115 (1939) (interpreting the words "fair and equitable" as used in section 77B of the former Bankruptcy Act as having acquired a "fixed meaning" through judicial interpretations in the field of equity receivership reorganizations).

preexisting bankruptcy doctrine requires proof of clear and unmistakable disavowal, not simply oblique inferences of implicit repeal.

Moreover, the validity of the Court's method of analysis is further supported by reference to the legislative materials accompanying the Code. For example, in drafting section 507(a)(4) governing the distributional priority of certain employee benefit claims, Congress intended to modify prior practice, and so stated in the relevant house report: "Paragraph (4) overrules *United States v. Embassy Restaurant*, 359 U.S. 29 (1958), which held that fringe benefits were not entitled to wage priority status." H.R. Rep. No. 95-595, at 357-58 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313. Dozens of similar statements appear in the legislative record.[12] As stated in

12. For example, in enacting section 105 governing, among other things, the injunctive powers of the bankruptcy court, Congress intended to change the prior law, and expressly stated its intent: "This section is also an authorization . . . for a court of the United States to stay the action of a state court. As such, *Toucey v. New York Life Insurance Company*, 314 U.S. 118 (1941) is overruled." H.R. Rep. No. 95-595, at 317 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6274. Similarly, in drafting section 523 governing exceptions to the Code's discharge provisions, the legislative materials state: "The provision is intended to overrule *Birkett v. Columbia Bank*, 195 U.S. 345 (1904)." 124 Cong. Rec. 32,399, 33,998 (1978). Likewise, in drafting section 541 defining property of the bankruptcy estate, the materials explain: "Paragraph 1 [541(a)(1)] has the effect of overruling *Lockwood v. Exchange Bank*, 190 U.S. 294 (1903) . . . [and] *Lines v. Frederick*, 400 U.S. 18 (1970)." H.R. Rep. No. 95-595, at 368 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6324. Moreover, in drafting section 1123(a)(5)(c) governing the contents of a plan of reorganization, the legislative materials state: "Subparagraph (C), as it applies in railroad cases, has the effect of overruling *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298 (1954)." H.R. Rep. No. 95-595, at 407 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6363; S. Rep. No. 95-989, at 119 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5905. In amending the Code, Congress has continued the practice of stating its intent to overrule prior practice.

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Dewsnup, "this Court has been reluctant to accept arguments that would interpret the Code . . . to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." 502 U.S. at 419. As the foregoing illustrates, the Court's reluctance is well-founded: when Congress intends to abrogate prior bankruptcy practices, it does not employ methods of stealth, but rather expresses its designs directly in the legislative record.

Turning to the matter at hand, it is significant that, like the provisions of section 544 addressed in *Midlantic*, section 506(c) is also a codification of a judicially developed rule.[13] In order to understand the relevant procedure, however, it is helpful first to place the matter in appropriate historical context.

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For example, in revising section 106(c), Congress indicated: "This section would effectively overrule two Supreme Court cases [*Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96 (1989) and *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992)]." 140 Cong. Rec. H10,766 (daily ed. Oct. 4, 1994). In addition, Congress has also not been bashful in stating its intent to overturn lower court decisions. For example, in drafting section 330 governing compensation, the legislative materials state: "The effect . . . is to overrule *In re Beverly Crest Convalescent Hospital, Inc.*, 548 F.2d 817 (9th Cir. 1976, as amended 1977)." H.R. Rep. No. 95-595, at 330 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6286. Similarly, in drafting section 330(a), the materials state: "*Massachusetts Mutual Life Insurance Company v. Brock*, 405 F.2d 429, 432 (5th Cir. 1968) is overruled." 124 Cong. Rec. 32,395, 33,994 (1978). Numerous additional examples appear throughout the legislative materials.

13. Confirming this point, the table of derivations appearing in the legislative history to the Bankruptcy Code does not cross-reference section 506(c) to any prior section of the former Bankruptcy Act. Instead, it references a single case: *Textile Banking Co. v. Widener*, 265 F.2d 446 (4th Cir. 1959). *See* Staff of House Comm. on Judiciary, 95th Cong., 1st Sess., *Table of Derivation of H.R. 8200*, 8 (Comm. Print No. 6 1977). *Widener*, however, provides no discussion on the issue of whether a trustee alone is the proper party to pursue a surcharge claim.

A. Reference to Established Pre-Code Practice Demonstrates That Hartford's Right to Pursue and Recover the Priority of Its Administrative Claim Is a Longstanding Right That Hartford Is Entitled to Assert in This Case.

Congress has enacted five different bankruptcy acts, the first three of which were of relatively short duration.[14] Between the repeal of the Act of 1867, and the passage of the monumental Act of 1898 (and, indeed, for some time thereafter), the federal courts engaged in a thriving insolvency business in the form of the equity receivership. Encouraged largely by the need for some means to rehabilitate insolvent railroads, the equity receivership was a creature wholly of judicial creation.[15]

During this time, the Court heard a number of appeals arising from receivership proceedings, and intervened to establish a variety of equitable bankruptcy rules that still form the backbone of current insolvency law. *See Northern Pac. Ry. Co. v. Boyd*, 228 U.S. 482, 508 (1913) (discussing the judicially created absolute priority rule); *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. Partnership*, 119 S. Ct. 1411, 1417 (1999) (explaining section 1129(b)(2)(B)(ii) of the Code

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14. *See* Bankruptcy Act of 1800, ch. 19, 2 stat. 19 (1800) (repealed 1803); Bankruptcy Act of 1841, ch. 9, 5 stat. 440 (1841) (repealed 1843); Bankruptcy Act of 1867, ch. 176, 14 stat. 517 (1867) (repealed 1878); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 13-14 (1995).

15. For a general discussion of equity receivership practice, particularly concerning railroad reorganizations, *see* Douglas G. Baird, *The Elements of Bankruptcy* 64-66 (rev. ed. 1993); G. Eric Brunstad, Jr. & Mike Sigal, *Competitive Choice Theory and the Unresolved Doctrines of Classification and Unfair Discrimination in Business Reorganizations under the Bankruptcy Code*, 55 Bus. Law. 1, 42 (1999); *see also Continental Illinois Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 670-72 (1935) (summarizing the history of federal bankruptcy enactments and discussing the equity receivership).

as a codification of the absolute priority rule articulated in *Boyd*). Significantly, among the cases heard during this period was the above-cited *Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501 (1891).

In *Wilson*, the U.S. Circuit Court for the Southern District of Illinois appointed a receiver to take possession of the defunct Louisville, Evansville & St. Louis Railway Company. Following customary practice, the railroad was sold as a going concern through a judicial foreclosure procedure to a newly organized firm.

An attorney who had supplied services to the railroad by assisting in the recovery and rental of equipment, filed a claim seeking, among other things, payment of his fees. Because the receiver had not paid the claim, and had no unencumbered funds to do so, the attorney argued that he was entitled to payment out of the secured parties' collateral. Responding to this argument, the Court framed and addressed the following question:

> What were the services for which the appellee made his claim[,] and were they so beneficial to the security holders that a court of equity might justly give them priority? And the question, it will be borne in mind, is not, whether out of the earnings of the road such claims are payable, but whether, where there are no surplus [unencumbered] earnings, they may be paid out of the *corpus* of the property in preference to secured liens.

Id. at 506 (emphasis added). In resolving the question, the Court concluded that the attorney's services had, indeed, conferred a benefit on the secured creditors, and also concluded, as a matter of equity, that the fees ought to be paid out of the secured creditors' collateral. *See id.* at 507. Responding further to the argument that provision for the payment of attorney's fees had not been made in the order

appointing the receiver, the Court also concluded that this fact would neither bar the attorney's recovery, nor prevent review of the priority of his claim. *See id.* Given the value of the services to the secured parties (fixed by the relevant testimony at $300), the Court concluded, "[w]e think, therefore, there was no impropriety in allowing intervenor three hundred dollars for these services." *Id.* at 507.

Following *Wilson*, and the subsequent passage of the Bankruptcy Act of 1898,[16] courts continued the practice of permitting certain administrative expenses to be paid out of property encumbered by the lien of a secured party in a bankruptcy case.[17] Although the Act contained no express

16. Bankruptcy Act of 1898, ch. 541, 30 stat. 544 (1898) (repealed 1979).

17. The practice of allowing an equitable charge against a fund traces its origins in federal proceedings to *Bronson & Soutter v. La Crosse & Milwaukee R.R.*, 68 U.S. (1 Wall.) 405 (1863). There, the Court recognized that, pending the outcome of an appeal, a lower court had the power to protect and preserve the property (a railroad) within its control from waste or loss. In so ruling, the Court affirmed the appointment of a receiver authorized to use operating revenues to run the railroad. The Court ruled that only the net revenues — those remaining after the payment of the costs incurred by the receiver – must be reserved for general distribution. *See id.* at 410; *see also New York Dock Co. v. Steamship Poznan*, 274 U.S. 117, 121 (1927). After the enactment of the Bankruptcy Act, the Court continued to allow charges of this kind on equitable grounds. For example, in *Adair v. Bank of America National Trust & Savings Ass'n*, 303 U.S. 350 (1938), the Court allowed a commissioner, appointed under the Bankruptcy Act, to charge the proceeds of certain farm crops with the costs of harvesting them. The Court allowed this charge despite the existence of a chattel mortgage on the crops, stating:

> [The chattel mortgagee] certainly cannot complain of the devotion of the proceeds of the 1934 crop to the cost of harvesting that crop. The care and harvesting of that crop represented the only way to preserve its worth, and the

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provision authorizing this practice, federal courts held routinely that certain expenses should be given priority over the claims of secured creditors to the extent of a benefit to the secured party. *See Machinery Rental, Inc. v. Herpel (In re Multiponics, Inc.)*, 551 F.2d 1049, 1051 (5th Cir. 1977); *Dreyfuss v. Klein (In re Tyne)*, 257 F.2d 310, 312 (7th Cir. 1958); *Virginia Sec. Corp. v. Patrick Orchards, Inc.*, 20 F.2d 78, 81 (4th Cir. 1927). Significantly, as in *Wilson*, the rationale for allowing the priority remained steadfastly equitable. *See Machinery Rental, Inc.*, 551 F.2d at 1051 ("[T]he lienholder can be charged with general costs of administration, where he has in some manner caused or benefited from such expenditure, or expressly or impliedly consented thereto."); *Dreyfuss*, 257 F.2d at 312 ("[W]here expenses are incurred that primarily benefit the lienholder such expenses should be allocated to him in the proportion to the benefit he derives therefrom."); 6 Remington, *supra* note 8, § 2606-08 at 128-35.

Moreover, nothing in these decisions indicates that the equitable right to recover a claim from property encumbered by a lien was established solely to protect the trustee or the estate. On the contrary, the cases establish the opposite rule that any claimant who provided services during an attempted reorganization that resulted in a benefit to a security holder could recover its claim directly from the secured property.

For example, in *National Acceptance Co. v. Magill (In re Chapman Coal Co.)*, 196 F.2d 779 (7th Cir. 1952), the Court of Appeals for the Seventh Circuit affirmed an order granting a union's petition for priority status of certain wage and benefit

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> cost of protecting a fund in court is everywhere recognized as a dominant charge on that fund.

Id. at 360-61 (citation omitted); *see also Warren v. Palmer*, 310 U.S. 132, 139 (1940); 6 Remington, *supra* note 8, § 2608 at 132-35 (describing equitable surcharge practice under the former Bankruptcy Act).

claims over the lien of a secured party. In affirming the petition, the court observed that the "continued employment of the [union] workers [was] necessary for the preservation of the mine properties of the debtor, and that such operation would be 'to the best interests of the parties,' including [the secured creditor] which held a lien on all of the properties of the debtor." *Id.* at 784. Recognizing that "it was possible to continue the operation of the mine only by continuing to employ the [union] workers," the court affirmed an order granting the union priority over the secured creditor. *Id.* at 784, 785; *see also Rabyor v. Franklin Mortgage Co. (In re Rotary Tire & Rubber Co.)*, 2 F.2d 364 (6th Cir. 1924) (allowing unpaid premiums owed to brokers who had provided insurance during the bankruptcy proceedings to be charged against collateral ahead of existing mortgage).

In addition, a number of pre-Code decisions allowed both the trustee *and* some other claimant to proceed jointly against encumbered property of the debtor's bankruptcy estate. *See United States v. Henderson*, 274 F.2d 419, 421-22 (5th Cir. 1959) (involving both the trustee and his attorney as parties to an appeal regarding the payment of their fees from mortgaged property); *First W. Sav. & Loan Ass'n v. Anderson*, 252 F.2d 544, 546-47 (9th Cir. 1958) (allowing both the trustee and her attorney to bring petitions that charged the mortgaged property with the costs of their services); *Citizens & S. Nat'l Bank v. Mullins (In re Bolton Road Med. Ctr.)*, 433 F. Supp. 369, 370-71 (N.D. Ga. 1976) (involving an action where both the trustee and his attorney were parties to a proceeding for the recovery of fees from secured property); *In re Alaska Plywood Corp.*, 166 F. Supp. 423, 425 (D. Alaska 1958) (allowing both the trustee and a stockholders' committee to request priority over mortgaged property); *In re Rice Leghorn Farm, Inc.*, 113 F. Supp. 903, 906 (W.D. Mo. 1953) (allowing the trustee, his attorney, counsel for the petitioning creditors, and counsel for the debtor to bring applications for priority over secured creditors); *In re Louisville Storage Co.*, 21 F. Supp. 897, 898 (W.D. Ky. 1936) (allowing the trustee, as well as an attorney

for the receiver, and an employee of the bankrupt, to bring petitions seeking priority over secured creditors), *aff'd sub nom. Louisville Title Mortgage Co. v. Louisville Storage Co.*, 93 F.2d 1008 (6th Cir. 1938). Of course, in addition to these cases, numerous others involved only a trustee's attempt to recover certain expenses against a secured party's collateral. Significantly, however, none of these decisions discuss (let alone adopt) the view that a trustee is better suited to pursue a surcharge claim than an administrative claimant, and none of the cases deny an administrative claimant the right to recover its claim on the ground that the claimant was not a proper party to do so.[18]

In enacting section 506(c) as part of the Bankruptcy Code, Congress is presumed to have been aware of the precedents outlined above. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."); *see also United States v. Wells*, 519 U.S. 482, 495 (1997); *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995). In addition, Congress was presumptively aware of this Court's method of

18. Instead, the focus of each case is on the equitable grounds for allowing the charge against the collateral. *See Machinery Rental, Inc. v. Herpel (In re Multiponics, Inc.)*, 551 F.2d 1049, 1051 (5th Cir. 1977); *Textile Banking Co. v. Widener*, 265 F.2d 446, 453-54 (4th Cir. 1959); *Dreyfuss v. Klein (In re Tyne)*, 257 F.2d 310, 312 (7th Cir. 1958); *Meinhard, Greeff & Co. v. Edens*, 189 F.2d 792, 796 (4th Cir. 1951); *Freeman Furniture Factories v. Bowlds (In re Ames Corp.)*, 136 F.2d 136, 140-41 (6th Cir. 1943); *Maxcy v. Walker (In re Lake Nursery Co.)*, 119 F.2d 535, 536 (5th Cir. 1941); *Miners Sav. Bank v. Joyce*, 97 F.2d 973, 977 (3d Cir. 1938); *Virginia Sec. Corp. v. Patrick Orchards, Inc.*, 20 F.2d 78, 81 (4th Cir. 1927); *C. B. Norton Jewelry Co. v. Hinds (In re Jones)*, 245 F. 341, 343 (8th Cir. 1917); *Gugel v. New Orleans Nat'l Bank*, 239 F. 676, 679 (5th Cir. 1917); *Ridgely Nat'l Bank v. Matheny (In re Utt)*, 105 F. 754, 757 (7th Cir. 1901); *In re Boyer*, 130 F. Supp. 20, 23 (D. Minn. 1955); *In re Centralia Ref. Co.*, 35 F. Supp. 599, 602 (E.D. Ill. 1940); *In re Dawkins*, 34 F.2d 581, 581-82 (E.D. S.C. 1929); *The Bethulia*, 200 F. 879, 881 (D. Mass. 1912); *In re Chambersburg Silk Mfg. Co.*, 190 F. 411, 412 (M.D. Pa. 1911).

interpreting the bankruptcy laws, including the Court's presumption of the ongoing validity of pre-Code practice. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (stating that "[i]t is presumable that Congress legislates with knowledge of our basic rules of statutory construction," particularly those that are well-settled). Hence, if Congress had intended to abrogate the rule recognizing the right of administrative claimants to pursue their claims against property encumbered by a lien, then one would expect Congress to have made that intention explicit in the legislative materials accompanying the Code, as it did on other occasions. *See Dewsnup*, 502 U.S. at 419. In this instance, however, the only evidence is that Congress intended to continue the prior law.

B. Hartford's Right to Pursue the Priority of Its Claim Under Section 506(c) Is Further Established by Reference to the Legislative Materials.

That Congress intended section 506(c) to codify preexisting practice is evident from the legislative history. H.R. 8200, the bill that Congress ultimately enacted as the Bankruptcy Code, contained a proposed section 506(c) identical to the current provision. H.R. 8200, 95th Cong. § 506(c) (1977). On September 8, 1977, the House Judiciary Committee reported H.R. 8200 favorably to the full House, which debated the bill on October 27 and 28, 1977, and again on February 1, 1978. The committee report accompanying the bill describes the measure as follows:

> Subsection (c) also codifies current law by permitting the trustee to recover from property whose value is greater [sic] than the sum of the claims secured by a lien on that property that [sic] reasonable, necessary costs and expenses of preserving, or disposing of, the property. The recovery is limited to the extent of any benefit to the holder of such claim.

H.R. Rep. No. 95-595, at 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313.[19] Although the passage is obviously short on explication, and embraces a partly erroneous description of the section's actual operation (which was subsequently clarified),[20] it is nonetheless evident that Congress harbored no intent to change prior doctrine relating to surcharge rights. On the contrary, the statement in the report that section 506(c) was intended to codify the current law only signals Congress's intent to maintain the status quo.

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19. The Senate version of the Bankruptcy Code, S. 2266, as reported by the Senate Judiciary Committee and considered on the floor on September 7, 1978, contained a proposed section 506(c) identical to the provision in H.R. 8200. S. 2266, 95th Cong. § 506(c) (1978). Likewise, the Senate Report accompanying the bill restated the discussion in the House Report. *See* S. Rep. No. 95-989, at 68 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5854.

20. The passage indicates that recovery under the section is predicated on the value of the collateral being "greater" than the sum of the relevant claims against the collateral. Use of the word "greater," however, is in error. If recovery under the section were predicated on the value of the collateral exceeding the sum of the liens, the requirement that the administrative claim must have benefited the secured party in order to be chargeable against the collateral would make no sense — if the claim were to be paid out of unencumbered funds, the interest of the secured party, and any benefit to it, would be immaterial. The description in the House Report regarding the operation of section 506(c) was clarified subsequently by Representative Edwards, one of the sponsors of the legislation:

> Section 506(c) of the House amendment was contained in H.R. 8200 as passed by the House and adopted, verbatim, in the Senate amendment. Any time the trustee or debtor in possession expends money to provide for the reasonable and necessary cost and expenses of preserving or disposing of a secured creditor's collateral, the trustee or debtor in possession is entitled to recover such expenses from the secured party or from the property securing an allowed secured claim held by such party.

124 Cong. Rec. 32,398 (1978); *see also* 124 Cong. Rec. 33,997 (1978).

Although the specific issue of an administrative claimant's ability to pursue relief under the section is not mentioned, this silence is not surprising given the brevity of the passage, the fact that many of the surcharge cases under the Bankruptcy Act involved claims brought by trustees, and the fact that, under the prior law, the ability of nontrustees to assert the same relief was entirely uncontroversial. Moreover, under the rules of construction outlined above, Congress is expected to explain its intent regarding specific pre-Code practice *only* if Congress intends to abrogate the practice, and the mere discussion of the relevant general pre-Code practice without mention of the particular procedure at issue in this case is not grounds for inferring an intent to abrogate the unmentioned procedure.

In *Midlantic*, the Court observed that "[i]n codifying the judicially developed rule of abandonment [codified in section 544], Congress also presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws." 474 U.S. at 501. Similarly, in this case, in codifying the judicially developed rule of equitable surcharge in section 506(c), Congress also presumably included the established corollary that individual claimants could recover their claims directly. Following *Midlantic*, as well as the other relevant precedents cited above, the Court should conclude that its rule in *Wilson* still endures.

II. THE BANKRUPTCY CODE SHOULD BE CONSTRUED AS A WHOLE, AND REFERENCE TO THE CODE AS A WHOLE DEMONSTRATES THAT HARTFORD IS ENTITLED TO RECOVER ITS CLAIM FROM MAGNA'S COLLATERAL UNDER SECTION 506(c).

As this Court has directed, the Code, like other comprehensive remedial schemes, should be construed as a whole, not as a collection of unrelated provisions. *See United*

Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (construing sections 361, 362, and 506 of the Bankruptcy Code, and observing that "[s]tatutory construction . . . is a holistic endeavor"); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (stating that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy" (citations and internal quotations marks omitted)); *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 218 (1936) ("To fix the meaning of these provisions [of the Bankruptcy Act] there is need to keep in view the background of their history. There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts."). In this instance, wholly apart from consideration of the Bankruptcy Code's legislative history and the relevant pre-Code practice, Hartford's ability to pursue the priority of its administrative claim under section 506(c) follows directly from consideration of the text of the Code as a whole, and also from its overall purpose, structure, and design.

As indicated above, section 506(c) states that a "trustee" may recover certain administrative expenses from a secured party's collateral, and, obviously, Hartford is not a trustee. This observation, however, is not dispositive. Consistent with the structure of the Code, what matters is that section 506(c) does not say that "only" a trustee may enforce its provisions. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 536 (1947) ("One must also listen attentively to what it [the statute] does not say.").

In drafting the Bankruptcy Code, in instances in which Congress has intended to limit the ability of a party in interest to enforce a particular section, Congress has done so expressly, either by stating that "only" certain parties may pursue relief under the particular section, or by specifically *precluding* enumerated parties from enforcing the provision. For example, section 707(b) governs who may request dismissal of a chapter 7 case for "substantial abuse." Significantly, section 707(b) does

not simply authorize certain parties to pursue relief under this provision as a means to identify those parties with rights under the section and those without. On the contrary, section 707(b) expressly provides that relief under the section may be sought by "the court, on its own motion or on a motion by the United States trustee, *but not at the request or suggestion of any party in interest.*" 11 U.S.C. § 707(b) (emphasis added).

Similarly, in defining who may be a debtor under the various chapters of the Bankruptcy Code, the various subsections of section 109 are quite specific in delimiting the persons with and without rights under the provisions. For example, section 109(a) provides that "*only* a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title." 11 U.S.C. § 109(a) (emphasis added). Likewise, section 109(d) provides that "*[o]nly* a person that may be a debtor under chapter 7 of this title, *except* a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title." 11 U.S.C. § 109(d) (emphasis added); *see also* 11 U.S.C. § 303(a) (stating that the section applies "only" against certain persons, and not others), § 307 (providing that the United States trustee may raise, appear and be heard on any issue "but may not file a plan"), § 341(c) (directing that the court "may not preside at, and may not attend" a meeting of creditors), § 702(a) (specifying that "only" certain creditors may vote for a trustee), § 706(c) (expressly limiting relief under the section to the debtor), § 1109(a) (expressly limiting the standing of the Securities and Exchange Commission to take an appeal), § 1112(c) (expressly limiting relief under the section to the debtor), § 1112(d) (same), § 1121(b) (providing that "only" the debtor may file a plan within a prescribed period of time), § 1121(e) (same), § 1164 (providing that certain governmental agencies may raise issues and appear and be heard, but may not take an appeal), § 1303 (specifying certain rights of the debtor "exclusive" of the trustee), § 1304(b) (same), § 1307(c)(9) (prescribing that "only"

the United States trustee may request certain relief), and § 1307(c)(10) (same).

Congress's deliberate decision to foreclose the ability of specially enumerated parties to invoke specific provisions of the Code demonstrates Congress's general intent not to foreclose parties in interest from invoking provisions that carry no special restrictions. *See Toibb v. Radloff*, 501 U.S. 157, 161 (1991) (explaining in the context of construing section 109 of the Bankruptcy Code that "[t]he Code contains no ongoing business requirement for reorganization under Chapter 11, and we are loath to infer the exclusion of certain classes of debtors from the protections of Chapter 11, because Congress took care in § 109 to specify who qualifies — and who does not qualify — as a debtor under the various chapters of the Code. . . . Congress knew how to restrict recourse to the avenues of bankruptcy relief; it did not place Chapter 11 reorganization beyond the reach of a nonbusiness individual debtor."). As this Court has explained, where Congress uses words of limitation to restrict the availability of relief under one section of a statutory scheme, but not another, the latter section should not be construed as carrying an implied limitation that does not, in fact, exist, particularly where, as here, the implied restriction would undermine the effectiveness of the particular provision. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404-05 (1991) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (refusing to restrict one section of the RICO statute based on a restriction in another section, particularly where doing so would blunt the effectiveness of the provision)); *General Motors Corp. v. United States*, 496 U.S. 530, 541 (1990) ("The fact that Congress explicitly enacted an enforcement bar similar to the one proposed by petitioner in one section of the statute, but failed to do so in the section at issue in this case reinforces our refusal to import such a bar here.").

In this instance, Hartford has the right to pursue the priority of its administrative claim under section 506(c) because the historic right of an administrative claimant to pursue the kind

of relief provided by the section is not specifically precluded, and is therefore presumed to endure. In addition, Hartford's right in this case is established by reference to section 1109(b), and likewise to sections 502(a) and 503(a).

A. Reference to Section 1109(b) Further Establishes Hartford's Right to Pursue the Priority of Its Claim Under Section 506(b).

Section 1109(b) provides generally that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, *may raise and may appear and be heard on any issue* in a case under this chapter." 11 U.S.C. § 1109(b) (emphasis added). As Judge Posner has explained, section 1109(b) simply means what it says:

> [that] anyone who has a legally protected interest that could be affected by a bankruptcy proceeding is entitled to assert that interest with respect to any issue to which it pertains, thus making explicit what is implicit in an *in rem* proceeding — that everyone with a claim to the *res* has a right to be heard before the *res* is disposed of since that disposition will extinguish all such claims.

In re James Wilson Assocs., 965 F.2d 160, 169 (7th Cir. 1992).

In this case, Hartford has an obvious interest in having its administrative claim paid from property of the Debtor's bankruptcy estate. More to the point, pursuant to sections 503(a) and 1109(b), Hartford is entitled to assert both its administrative claim, and also *any issue regarding the priority of its claim*, before the assets of the estate are finally distributed to Magna. Because nothing in section 506(c) precludes Hartford from asserting its position under section 1109(b), Hartford may pursue its interest.

The court below dismissed the relevance of section 1109(b) on the theory that the section applies only in a chapter 11 case,

and that the Debtor's case had been converted to a chapter 7 proceeding before Hartford filed its claim for relief. (App. 301a-302a n.3). It is true, of course, that the Debtor's case was converted from a chapter 11 proceeding to one under chapter 7 before Hartford filed its claim. It does not follow, however, that section 1109(b) is therefore inapposite.

To begin with, Hartford's claim accrued in its entirety during the course of the Debtor's chapter 11 proceeding. Thus, had Hartford asserted its claim before the conversion, Hartford would clearly have been entitled to rely on section 1109(b). Hartford's right ought not to be forfeited simply because of the conversion where nothing in the Bankruptcy Code directs such a result. *Cf.* 11 U.S.C. § 348(d). This conclusion is all the more compelling in this instance because Hartford did not have notice of the Debtor's bankruptcy case until two months *after* the case was converted to a chapter 7 proceeding. (App. 218a). But even if such were not the case, Hartford's right to enforce the priority of its claim should in no event turn on whether the case was a proceeding under chapter 11 or 7, given that section 506(c) applies equally in both types of proceedings and, presumably, should operate to the same effect in each instance. *See* 11 U.S.C. § 103(a).

More important, as Judge Posner has suggested, section 1109(b) is significant not simply for what is says, but also for the fundamental principle that it illuminates: in the absence of an express statutory provision foreclosing relief, fundamental principles of equity dictate that, in any *in rem* insolvency proceeding involving the distribution of property, a party has the right to assert its claim (including any available priority under the relevant distribution scheme), before that claim is extinguished through the distribution of the *res* to others. *See In re James Wilson Assocs.*, 965 F.2d at 169. *See also Katchen v. Landy*, 382 U.S. 323, 329-30 (1966); *City of New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293, 297 (1953) (stating that "even creditors who have knowledge of a reorganization have a right to assume that the statutory

'reasonable notice' will be given them before their claims are forever barred" and that "[t]he statutory command for notice embodies a basic principle of justice — that a reasonable opportunity to be heard must precede denial of a party's claimed rights"); *Gardner v. New Jersey*, 329 U.S. 565, 573-74 (1947); *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 192 (1902) (observing that "[p]roceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem*," and concluding that, so long as notice is given "to those who may be interested in opposing discharge," a decree discharging a debt is valid).[21] The concept of creditor participation follows from the right of creditors to obtain payment of their claims, not only from the debtor personally, but also from the debtor's available assets. *See Hanover Nat'l Bank*, 186 U.S. at 191 (discussing this right). In addition, the concept follows from the Court's analysis in *Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501 (1891), which established the equitable right of an administrative claimant in an insolvency proceeding to recover its claim from a secured creditor's collateral to the extent of a benefit to the secured party. *Id.* at 506-07; *see also New York Dock Co. v. Steamship Poznan*, 274 U.S. 117, 121 (1927). Thus, even in the absence of section 1109(b), Hartford should still be entitled to

21. As explained in the *Collier* treatise:

> [The purpose of section 1109(b)] is to grant any party with a financial stake in the case the right, at the party's election, to participate with respect to the judicial determination of any issue bearing on the ultimate disposition of his or her interest. This purpose traces its origins to basic considerations of due process: that no person directly affected by a judicial proceeding should suffer the consequences of the proceeding without a meaningful opportunity to appear and be heard.

7 *Collier on Bankruptcy* ¶ 1109.04[2][b] at 1109-29 (Lawrence P. King ed., 15th ed. revised 1999); *see also In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985) ("Section 1109(b) continues the pattern of permitting interested parties in bankruptcy cases the absolute right to be heard and to insure their fair representation.").

proceed on its claim and enforce its priority.[22] Yet, even if this were not so, Hartford is nevertheless entitled to enforce the priority of its claim under sections 502(a) and 503(a).

B. Reference to Sections 502(a) and 503(a) Also Establishes Hartford's Right to Pursue the Priority of Its Claim Under Section 506(c).

Section 502(a) provides in relevant part that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a *party in interest* . . . objects." 11 U.S.C. § 502(a) (emphasis added). As defined in section 101(5), the term "claim" includes any right to payment, whether "secured, or unsecured," and thus includes Magna's secured claim. 11 U.S.C. § 101(5); *see also Nobelman v. American Sav. Bank*, 508 U.S. 324, 331 (1993). Moreover, although the phrase "parties in interest" is not defined in section 502(a), it is defined expansively in section 1109(b), and there is no reason to presume in this instance that the same phrase appearing in different sections of the Code should have a different meaning. *See Patterson v. Shumate*, 504 U.S. 753, 758 (1992) (presuming consistency in meaning of same phrase used in different sections of the Bankruptcy Code); *see also United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 460 (1993); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).[23]

22. Few issues in bankruptcy are more important than a claimant's right of participation. As this Court has explained recently, in enacting the reorganization provisions of the Bankruptcy Code, "Congress adopted the view that creditors . . . are very often better judges of . . . their own economic self-interest than courts, trustees, or [governmental agencies]." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. Partnership*, 119 S. Ct. 1411, 1423 n.28 (1999). Indeed, implicit in the bankruptcy process as a whole, and explicit in the text of section 1109(b), is the unmistakable principle that creditors should have the right to champion their own interests on their own behalf.

23. The phrase "party in interest" is intended to include any party with a pecuniary interest in the particular controversy at issue. *See Yadkin*

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To the extent that a secured party (such as Magna) may seek to recover the payment of its secured claim from property of the estate without provision for the payment of administrative expenses in accordance with the requirements of section 506(c), this failure should constitute proper grounds for objection to the payment of the claim. *See Gardner*, 329 U.S. at 573 ("When objections [to claims] are made, [the bankruptcy court] is duty bound to pass on them. . . . Without that sifting process, unmeritorious or excessive claims might dilute the participation of the legitimate claimants."); *Pepper v. Litton*, 308 U.S. 295, 308 (1939) ("[T]he bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in the administration of the bankrupt estate."); *Wilson*, 138 U.S. at 506; *see also United States v. Energy Resources Co.*, 495 U.S. 545, 549 (1990); *Katchen*, 382 U.S. at 329-30.[24] Given the right of any party in interest under section 502(a) to assert an objection to a claim, it would be anomalous to conclude that, although Hartford (or any other party in interest) has standing to enforce indirectly the requirements of section 506(c) by objecting to the payment of Magna's secured claim, nevertheless Hartford lacks the

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Valley Bank & Trust Co. v. McGee (In re Hutchinson), 5 F.3d 750, 756 (4th Cir. 1993) (stating that the term "party in interest . . . is generally understood to include all persons whose pecuniary interests are directly affected by the bankruptcy proceedings").

24. Although cases such as *Pepper v. Litton* cited above were decided under the former law, Congress intended that they be followed in the administration of cases under the Code. *See* H.R. Rep. No. 95-595, at 359 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6315 ("The Bankruptcy Court will remain a court of equity . . . *Local Loan v. Hunt*, 292 U.S. 234, 240 (1934) [with power to disallow] a claim in appropriate circumstances. *See Pepper v. Litton, supra*.").

ability to assert its own interest in enforcing the section directly on the same ground.[25]

Moreover, it would be an exceptionally odd construction of the Code to conclude that, although Hartford has standing to pursue the general payment of its administrative claim from the estate under section 503(a), Hartford cannot pursue the claim's specific *priority* under section 506(c), but must rely on the trustee to do so, regardless of whether the trustee has any ability or incentive to carry this burden. In this instance, the trustee has neither the resources nor the incentive to pursue Hartford's claim because the trustee has not paid Hartford's claim from funds of the estate (and thus has no incentive to recover the expense for the estate), and lacks unencumbered funds to litigate with Magna. Hence, any forced reliance on the trustee would simply result in denial of the remedy prescribed by the statute, resulting in a windfall to the bank in derogation of Congress's intent in enacting section 506(c). *See North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229, 232 (9th Cir. 1991); *McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (W.D. Mich. 1991).

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25. The reason for permitting any party in interest in a bankruptcy case to object to the claims of other creditors is straightforward. As indicated previously, bankruptcy proceedings involve the division of assets under circumstances in which, typically, there are insufficient resources to pay everyone in full. Accordingly, parties may object to the claims of others in order to vindicate their own interests by ensuring that others do not take more than their prescribed share. In this case, Magna seeks to recover more than its fair share as defined by section 506(c). Because Hartford stands to benefit from keeping Magna honest, Hartford is properly a party in interest for purposes of section 502(a), and is entitled to object to Magna's claim. *Cf. In re Trenge*, 127 B.R. 552, 554-55 (E.D. Pa. 1991) (upholding junior secured creditor's standing to object to agreement between senior secured creditor and debtor in possession regarding surcharge of expenses that would dilute recovery for junior secured creditor).

In general, the Code requires individual claimants to pursue their own claims and rights in a timely fashion, including the assertion of any relevant priority. *See* 11 U.S.C. § 502(b)(9) (disallowing certain late-filed claims), § 726(a) (discussing the treatment of certain tardily filed claims); *see also Taylor v. Freeland & Kronz*, 503 U.S. 638, 644 (1992). Absent some statutory explanation evident from the text demonstrating that Hartford's pursuit of the payment of its administrative claim should be divorced from pursuit of the claim's priority, Hartford's right to assert both aspects of its claim under the Code should be recognized.

III. THE COURT BELOW RELIED IMPROPERLY ON A CANON OF CONSTRUCTION TO DENY HARTFORD'S RIGHT OF RECOVERY IN THIS CASE, AND HARTFORD IS ENTITLED TO ASSERT ITS CLAIM UNDER SECTION 506(c).

In construing section 506(c), the court below eschewed reliance on the overall text and structure of the Code, and instead invoked the maxim "*expressio unius est exclusio alterius*" — the expression of one thing (in a statute) is the exclusion of others — in reaching its conclusion that Hartford is not entitled to pursue the priority of its claim under the section. (App. 303a n.4). The court also reasoned that the language of section 506(c) is " 'clear and unambiguous,' " and therefore should be enforced " 'according to its terms.' " (App. 303a (quoting *Rake v. Wade*, 508 U.S. 464, 471 (1993)). The court's own analysis, however, reveals that the text of the section is far from plain on the question of who may enforce it, for if the meaning of the section were truly plain, the court would not have had occasion to invoke a canon of construction (i.e., the *exclusio* rule) to decipher its meaning. In truth, section 506(c) does not state (as the court implied) that "only" a trustee may enforce its terms, and no such limitation follows from any "plain" reading of the text. On the contrary, the plain, collective meanings of sections

1109(b), 503(a), and 502(a) demonstrate that section 506(c) cannot be exclusively its own arbiter on the question of who may enforce its requirements.

As this Court has warned, the *exclusio* rule is far from dispositive in the construction of statutory provisions. *See Ford v. United States*, 273 U.S. 593, 612 (1927) (observing that, while "[i]t is often a valuable servant, [the *exclusio* maxim is] a dangerous master to follow in the construction of statutes [and] ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice"); *see also National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (concluding that the maxim "must yield to clear and contrary evidence of legislative intent."); *Neuberger v. Commissioner*, 311 U.S. 83, 88 (1940) ("The maxim *expressio unius est exclusio alterius* is an aid to construction, not a rule of law. It can never override clear and contrary evidences of Congressional intent."). In this instance, the Code's text and structure, together with consideration of the logical relation between its several parts (including sections 1109(b), 503(a), and 502(a)), demonstrate that Congress did not intend the mere authorization of a trustee to pursue relief under section 506(c) to preclude others from doing so where their interests are implicated.

In an effort to uphold the Court of Appeals' analysis, Magna has argued that the question of Hartford's ability to recover its claim under section 506(c) should be determined in accordance with this Court's analysis in such cases as *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527 (1989), and *Davis v. Passman*, 442 U.S. 228 (1979), which prescribe various methods for determining the entitlement of certain parties to pursue implied causes of action under federal law. (*See* Brief in Opposition to Petition for Writ of Certiorari, at 8-9). These cases, however, are of no assistance to Magna.

To begin with, none of these cases involve interpretation of the bankruptcy laws, and as this Court has explained repeatedly, the correct standard to apply in construing the provisions of the Code is the approach taken in *Midlantic*. Moreover, even following the analysis undertaken in cases such as *Davis* and *Karahalios*, the Court should still conclude that Hartford is entitled to pursue the priority of its claim under section 506(c). In this instance, Hartford's right to enforce the priority of its administrative claim under section 506(c) follows not only from longstanding historical practice but also from the text of the Code itself (including consideration of sections 1109(b), 503(a), and 502(a)), the Code's overall structure, its legislative history, the purpose of the relevant sections, and the fact that denying Hartford its due would generate a windfall of the very type that Congress sought to prevent. Given Congress's intent in enacting section 506(c) to continue pre-Code practice, and the obvious need to recognize Hartford's right in this case to vindicate the statute's purpose, the Court should conclude that Hartford has the right to enforce the priority of its claim under the section.

IV. HARTFORD HAS STANDING UNDER THE COURT'S CONSTITUTIONAL AND PRUDENTIAL STANDING DOCTRINES TO ASSERT ITS RIGHT OF RECOVERY UNDER SECTION 506(c), AND DOING SO IS NECESSARY TO ENSURE COMPLIANCE WITH THE PURPOSES AND POLICIES OF THE BANKRUPTCY CODE.

As this Court has held, the issue of a party's standing to pursue relief under a federal statutory scheme requires analysis of "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citing *Barrows v. Jackson*, 346 U.S. 249 (1953)); *see also Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). In order to satisfy the Constitution, the claimant must meet the case and controversy requirements of Article III.

See Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 663-664 (1993); *see also Bennett*, 520 U.S. at 162; *Flast v. Cohen*, 392 U.S. 83, 101 (1968). In addition, the claimant must satisfy any relevant prudential standing limitation, such as whether the interest that the party in question seeks to vindicate arguably lies within the "zone of interests" sought to be protected or regulated by the relevant statutory scheme. *See Bennett*, 520 U.S. at 162; *Data Processing*, 397 U.S. at 153. In this case, Hartford satisfies each of the relevant requirements.

A. Hartford Has Constitutional Standing.

In this instance, it is undisputed that the relevant indebtedness to Hartford remains unpaid, and that Hartford seeks recovery of its own claim. It is equally undisputed that Hartford seeks payment from funds that would otherwise be payable to Magna, and that there are no other funds available to pay Hartford's claim. Finally, a ruling favorable to Hartford will result in payment to Hartford, thus redressing its injury. As Magna concedes, the constitutional requirements are not at issue, and Hartford has standing under Article III to pursue its claim. (*See* Brief in Opposition to Petition for Writ of Certiorari, at 10).

B. Hartford's Standing Is Necessary to Vindicate Its Own Tangible Interest, As Well As the Purposes of the Bankruptcy Code, and the Relevant Prudential Standing Requirements Are Satisfied.

Like the requirements of Article III, the Court's prudential standing doctrine is "founded in concern about the proper — and properly limited — role of the courts in a democratic society." *Warth*, 422 U.S. at 498. As stated by the Court in *Allen v. Wright*, 468 U.S. 737 (1984), the doctrine

> embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication

> of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Id. at 751; *see also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978). Moreover, as this Court held unanimously in *Bennett*, "Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated." 520 U.S. at 163.

The Bankruptcy Code bestows broad rights of standing on parties in interest (including Hartford in this case) to pursue and enforce the various sections of the Code that bear on their interests. Moreover, in this instance, Hartford's claim lies comfortably within the zone of interests that Congress sought to protect in enacting sections 506(c), 503(a), 502(a), and 1109(b), and Hartford is a proper party to pursue its claim. As this Court has stated, "the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of [one scheme] may not do so for other purposes." *Bennett*, 520 U.S. at 163. Thus, the "first question" is whether any relevant provision of the Bankruptcy Code "negates the zone-of-interests test . . . or, perhaps more accurately, expands the zone of interests . . . ." *Id.* at 164. Significantly, although no provision of the Bankruptcy Code expressly negates the Court's prudential standing doctrine, the relevant sections at issue here do affect the doctrine's application in favor of bestowing broad rights of participation on parties seeking to enforce the provisions of the Code. Hence, the zone of interests test should be applied as expansively as the provisions that Hartford seeks to vindicate.

As indicated previously, section 1109(b) expressly permits any party in interest in a chapter 11 case to "raise, appear and be heard on any issue" in the case. 11 U.S.C. § 1109(b). Similarly, section 503(a) expressly permits administrative claimants such as Hartford to pursue the recovery of their own

administrative claims. *See* 11 U.S.C. § 503(a). In turn, section 502(a) permits any party in interest in a case to object to any other party's claim in order to vindicate the provisions of the Code. *See* 11 U.S.C. § 502(a). Finally, section 506(c) provides expressly for the payment of administrative claims of the kind held by Hartford ahead of the claims of secured parties like Magna. *See* 11 U.S.C. § 506(c). Given the context, it is thus difficult to understand how Hartford's claim could not fall within the zone of interests of these provisions.

Of course, in some cases involving the enforcement of section 506(c), it only makes sense for the trustee to pursue payment of the particular expense at issue. For example, if the trustee has already paid an administrative claim from unencumbered funds of the bankruptcy estate, the claimant obviously has no incentive to enforce the requirements of the section because the claimant has already been paid. In such a case, the trustee is the appropriate party to enforce the section because the trustee would have every incentive to do so in order to replenish the estate on behalf of the estate's general creditors.[26] On the other hand, where, as here, the claim remains unpaid, and the trustee has neither the resources nor the inclination to pursue the matter on the claimant's behalf, the claimant is the only party with any incentive to enforce the statute, and thus should be permitted to do so in order to avoid the lapse of a perfectly valid right of recovery. Where, as in this case, the trustee has neither the ability nor the incentive to fulfill the policies and purposes of section 506(c), an administrative claimant like Hartford should be permitted to do so in its capacity as the real party in interest. Moreover, because the trustee has no interest in enforcing the priority of Hartford's claim, Hartford's pursuit of its own interest would occasion no intrusion on the trustee's function.

Similarly, it makes no difference whether a trustee has been selected to serve in the case (as in every chapter 7

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26. Creditors would also have an incentive to ensure the enforcement of section 506(c) in such a case, and, hence, would have standing to pursue the matter if the trustee failed to do so.

proceeding, and some chapter 11 proceedings), or whether a debtor in possession is supervising the estate (as in most chapter 11 proceedings).[27] As the court below indicated, a debtor in possession may enforce the requirements of section 506(c). (App. 303a n.4). This follows not only from the legislative history,[28] but also from section 1107(a). *See* 11 U.S.C. § 1107(a) (providing that a debtor in possession enjoys "all the rights . . . and powers . . . of a trustee serving in a case under this chapter"); *North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229, 231 (9th Cir. 1991). As discussed previously, where (as here) the trustee (or debtor in possession) has not paid an administrative claim, and lacks the ability or inclination to litigate with the secured party on the claimant's behalf, the claimant is entitled to assert the priority of its claim under section 506(c).

Taking a different approach, the court below concluded that Hartford should not be entitled to enforce the provisions of section 506(c) because doing so would undermine the Code's policy of equality of distribution. (App. 305a-306a). The court reasoned that, when a trustee recovers a claim under the section, the recovery should then be available for general distribution to creditors on a *pro rata* basis in accordance with their priorities. (App. 305a-306a). Thus, the court believed, Hartford should not be able to enforce the provision on its own account because doing so would generate a result "incompatible with the fundamental equal distribution goals of the Bankruptcy Code." (App. 306a). In addition, the court warned that permitting Hartford to pursue its claim would "invite 'a flood of satellite

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27. *See supra* notes 2 & 3 (discussing the concept and role of a debtor in possession in a chapter 11 case, and also the role of a trustee in the chapter 11 or 7 context).

28. *See supra* note 20 (reciting the relevant passage from the legislative history stating that a debtor in possession may enforce the provisions of section 506(c)).

litigation by those seeking to avoid a pro rata division of the estate.' " (App. 306a). The court's analysis, however, is in error.

If a trustee pays an administrative claim from funds of the bankruptcy estate, and then recovers the payment from a secured creditor's collateral, it makes sense to conclude that the recovery is then available for general distribution because the trustee's recovery simply replenishes funds in the estate. On the other hand, where (as here) the trustee does not pay the administrative claimant from funds of the estate, it makes no sense to conclude that any recovery obtained on account of the unpaid administrative claim is then subject to general distribution. Apart from generating inconsistent results based solely on whether the trustee initially pays the claim or not, there is no basis in the Code for concluding that a claim's priority in this context should be distributed to anyone other than the holder of the claim. *Cf.* 11 U.S.C. § 510. More important, the court's rule in this case could cause recoveries under section 506(c) to revert back to secured parties, thereby ensuring that the statute would not be enforced.

In this case, Magna lent funds to the Debtor after the Debtor filed for bankruptcy relief, and was granted in exchange broad collection rights against the estate, including lien rights on all of the Debtor's property to secure the Debtor's pre- and postpetition indebtedness to Magna. (App. 196a). Following the court's analysis that recoveries under section 506(c) are to be made available for general distribution in accordance with the creditors' respective priorities, this may simply mean that Magna would be entitled to collect any recovery on Hartford's claim under section 506(c), a result at odds with the purpose of the section. Section 506(c) bestows a priority in favor of the payment of certain kinds of claims from a secured party's collateral, and there is no reason why this priority should be eviscerated by requiring the disbursement of the benefits of the priority to others, including the very party whose collateral is supposed to bear the expenses in question.

Moreover, there is no merit to the conjecture that permitting parties such as Hartford to enforce the provisions of section 506(c) would generate a flood of satellite litigation. The rule permitting claimants such as Hartford to pursue surcharge claims has been in place for over a century, and the courts have experienced no such difficulty in administering it. Moreover, the right is no more cumbersome than any similar right to pursue a priority granted by the Code. Because claimants such as Hartford seek merely to enforce the provisions of section 506(c) under circumstances in which a trustee is unwilling or unable to do so, Hartford is entitled to enforce its right to prevent the windfall that the section seeks to avoid.

As the courts have acknowledged, "There is a longstanding bankruptcy policy of preventing a party from receiving a windfall merely by reason of the happenstance of bankruptcy." *Vienna Park Props. v. United Postal Sav. Ass'n (In re Vienna Park Props.)*, 976 F.2d 106, 113 (2d Cir. 1992) (internal quotation marks omitted) (quoting *Butner v. United States*, 440 U.S. 48, 55 (1979); *Lewis v. Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961)).[29] It is significant that, had Hartford's claim been incurred in a state court receivership proceeding,

29. Courts have recognized this principle in construing section 506(c). *See Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995); *New Orleans Pub. Serv., Inc. v. First Fed. Sav. & Loan Ass'n (In re Delta Towers, Ltd.)*, 924 F.2d 74, 77 (5th Cir. 1991); *North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229, 232 (9th Cir. 1991); *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91, 94 (3d Cir. 1986); *McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (W.D. Mich. 1991); *see also Bank of Marin v. England*, 385 U.S. 99, 103 (1966) (observing in construing section 70d(5) of the Bankruptcy Act "we do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction.").

the claim would have been paid out of the Magna's collateral.[30] Magna, of course, argues that it should be entitled to enjoy the benefit of the windfall that it seeks, but that is not the policy of the law.

In *Meyer v. Flemming*, 327 U.S. 161 (1946), this Court addressed and rejected an analogous argument under the prior Bankruptcy Act that, after the commencement of a bankruptcy proceeding and the appointment of a bankruptcy trustee, the debtor no longer had standing to prosecute a cause of action that he had previously commenced prior to filing for bankruptcy relief. In analyzing the matter, the Court recognized the general rule that, once a bankruptcy action has commenced, the right to prosecute a prepetition cause of action against third parties rightfully vests in the bankruptcy estate to be pursued by the trustee. *See id.* at 165. The Court also held, however, that "[i]f, because of the disproportionate expense, or uncertainty as to

30. *See Bahndorf v. Lemmons*, 525 N.W.2d 404, 408 (Iowa 1994) ("Expenses of a receivership . . . are to be paid first."); *Hyland v. Anchor Fin. Co.*, 369 A.2d 12, 15 (N.J. 1977) ("Our courts have consistently held that receivership costs have priority over the claims of a secured creditor."); *South County Sand & Gravel Co. v. Bituminous Pavers Co.*, 274 A.2d 427, 430 (R.I. 1971) (noting judicial rule permitting receivership expenses to be taxed against encumbered property to the extent that secured creditor or the collateral securing such debt has been benefited or otherwise advantaged by the receivership proceedings); *In re Atlas Iron Const. Co.*, 46 N.Y.S. 467, 468 (N.Y. App. Div. 1897) ("The fees and expenses of administration are disbursements necessary to realize the sum of money from the assets of the corporation to distribute among its creditors . . . such disbursements are necessary before the property can be reduced to money, and the debts of the corporation collected."); *Horton v. McNally Co.*, 151 N.Y.S. 674, 677 (N.Y. Sup. Ct. 1915) (noting that "expenditures necessary for the preservation of the property" are administrative claims and are paid prior to secured receiver's certificates). Additionally, individual claimants have been recognized in the state receivership context as entitled to assert directly a claim for the payment of an administrative expense. *See Gurney v. Atlantic & Great W. Ry. Co.*, 58 N.Y. 358, 366-68 (1874).

the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation." *Id.* at 166. Because the court below failed to adhere to this principle as articulated in the bankruptcy context in *Meyer*, the Court should reverse the decision and conclude that Hartford has the right to pursue the priority of its claim under section 506(c).

CONCLUSION

For the foregoing reasons, Hartford respectfully requests that the Court determine that Hartford has the right to enforce the priority of its administrative claim under section 506(c) in this case, reverse the *en banc* decision of the Court of Appeals, and remand for further proceedings consistent with the Court's holding.

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IN THE
Supreme Court of the United States

HARTFORD UNDERWRITERS INSURANCE COMPANY,
Petitioner,

v.

UNION PLANTERS BANK, N.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Does Section 506(c) of the United States Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"), provide unpaid administrative claimants of a bankruptcy estate with a personal right to recover for their exclusive benefit the unpaid amount of their administrative expense claims from the collateral of a secured creditor?

CORPORATE DISCLOSURE STATEMENT

Respondent Union Planters Bank, N.A., is the successor in interest due to merger, effective as of October 9, 1998, to Magna Bank, N.A. Union Planters Bank, N.A. is a wholly-owned subsidiary of Union Planters Corporation, a publicly-traded corporation. No publicly held company owns 10% or more of Union Planters Corporation's stock.

Although *Brief for Petitioner* and the decision below refer to Respondent as "Magna," Respondent is referred to herein as "Union Planters."

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IN THE

Supreme Court of the United States

No. 99-409

HARTFORD UNDERWRITERS INSURANCE COMPANY,
Petitioner,

v.

UNION PLANTERS BANK, N.A.,
Respondent.

On Writ of Certiorari to the United States Coourt of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This matter arises out of the bankruptcy proceedings of Hen House Interstate, Inc. (the "Debtor"), a closely-held corporation that at one time owned and/or operated eighteen restaurants located throughout the Midwest, as well as an outdoor advertising firm based in Muncie, Indiana. App. 38a.

The Debtor's bankruptcy proceedings were commenced on September 5, 1991, when the Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Missouri (the "Bankruptcy Court"). App. 253a. At the time it filed its bankruptcy petition, the Debtor hoped to reorganize its business under the provisions of Chapter 11 and ultimately emerge from bank-

ruptcy. App. 254a. As a "Chapter 11 debtor-in-possession" under the provisions of Bankruptcy Code Section 1107, the Debtor initially was allowed to remain in possession of its assets and continue managing its financial affairs. App. 37a.

Prior to the commencement of the Debtor's bankruptcy proceedings, Union Planters[1] provided financing to the Debtor, which was secured by a perfected security interest in essentially all of the Debtor's real and personal property. App. 181a-191a. At the time of the Debtor's bankruptcy filing, the outstanding indebtedness owing by the Debtor to Union Planters with respect to the foregoing financing was in excess of $4,000,000. App. 190a-191a.

Under the provisions of Bankruptcy Code Section 363 (c)(2), a Chapter 11 debtor-in-possession may ordinarily not spend or otherwise use any "cash collateral"—that is, funds in which a creditor has a security interest—unless it obtains the consent of the secured creditor and/or authorization from the bankruptcy court. Consequently, immediately upon the filing of its bankruptcy petition, the Debtor did not have authority to use any cash or other funds subject to Union Planters' security interest. App. 43a-44a. Following the commencement of the bankruptcy proceeding, however, Union Planters and the Debtor negotiated the terms of a Post-Petition Loan Agreement (the "Post-Petition Loan Agreement"), pursuant to which

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[1] As noted above, Union Planters is the successor by merger to Magna Bank, N.A. ("Magna"). Magna, in turn, was the successor in interest to the rights, claims and interests of Landmark Bank of Illinois ("Landmark") under various financing and loan documents by and between the Debtor and Landmark. For purposes of convenience, reference herein is made to Union Planters, notwithstanding that certain facts may pertain to Landmark prior to its acquisition by Magna and/or to Magna prior to its merger into Union Planters.

Union Planters agreed (subject to certain terms and conditions) that during the course of the Debtor's Chapter 11 proceeding, it would not only allow the Debtor to use its cash collateral but it would also provide the Debtor with an additional $300,000.00 in "post-petition financing." App. 48a-93a.

After granting the Debtor "interim" authority to obtain limited financing under the Post-Petition Loan Agreement, the Bankruptcy Court entered a *Final Order Authorizing Debtor to Obtain Post-Petition Secured Credit, Granting Senior Liens, and Administrative Priority Expense, Modifying Automatic Stay, Providing Adequate Protection and Authorizing Agreements with Landmark Bank of Illinois* on October 25, 1991 (the "Final DIP Order"), pursuant to which it gave final aproval and authorization for the Debtor to enter into the Post-Petition Loan Agreement. App. 178a-206a. Under the terms of the Final DIP Order, the Bankruptcy Court granted Union Planters a first priority senior lien and security interest in all the Debtor's then owned or thereafter acquired real and personal property. App. 196a. In addition, under paragraph 33 of the Final DIP Order, the Bankruptcy Court ordered that:

> [e]xcept for [a $10,000.00 professional fees] Carve Out, no expenses of administration of Debtor's Chapter 11 case or any future proceeding which may develop out of such case, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against [Union Planters] or [its] Collateral, whether pursuant to § 506(c) of the Bankruptcy Code or otherwise, without the prior written consent of [Union Planters], and no such consent shall ever be implied from any other action, inaction, or acquiescence.

App. 201a.

After the entry of the Final DIP Order, Union Planters advanced the entire $300,000.00 in post-petition financing to the Debtor and allowed the Debtor to use its cash collateral. App. 206a. Even with this additional financing, however, the Debtor was unable to successfully reorganize. Consequently, on January 23, 1993, the Debtor's Chapter 11 case was converted to a Chapter 7 liquidation proceeding. App. 251a. Shortly thereafter, Robert J. Blackwell (the "Trustee") was appointed as the trustee of the Debtor's Chapter 7 bankruptcy estate and charged with the responsibility of liquidating the assets of the estate and distributing the resulting proceeds to creditors in accordance with the provisions of Chapter 7 of the Bankruptcy Code. App. 251a.

As a result of the Debtor's failure to successfully reorganize, Union Planters sustained a loss of approximately $1.5 million in unpaid principal, plus additional amounts for unpaid interest and attorneys fees and expenses owing by the Debtor. App. 254a.

During the course of Debtor's Chapter 11 proceeding, Petitioner Hartford Underwriters Insurance Company ("Hartford") provided workers' compensation insurance coverage to the Debtor. App. 253a. Under the terms of the insurance policy issued by Hartford to the Debtor (the "Policy"), the Debtor was responsible for making monthly premium payments to Hartford. App. 224a-226a. Although the Debtor repeatedly failed to make these monthly premiums to Hartford throughout the Chapter 11 proceeding, Hartford did not make any attempt during that time to cancel or terminate the Policy (even though it could have done so under the terms of the Policy). App. 224a-227a. Consequently, by the time the Debtor's bankruptcy proceedings were converted to Chapter 7, Hartford was owed in excess of $50,000 in unpaid premiums by the Debtor. App. 253a.

Following the conversion of the Debtor's bankruptcy case to a Chapter 7 proceeding, Hartford filed an *Application for Allowance of Administrative Expense Pursuant to 11 U.S.C. Section 503 and Charge Against Collateral Pursuant to 11 U.S.C. Section 506(c)* (the "Application") with the Bankruptcy Court. App. 207a-211a. Pursuant to this Application Hartford not only requested that it be awarded an administrative priority claim under Bankruptcy Code Section 503(a) for the unpaid premiums owing by the Debtor, but also that it be allowed to recover these premiums from Union Planters' collateral under the provisions of Bankruptcy Code Section 506(c). As Hartford now acknowledges, prior to the filing of this Application, it never requested nor made demand upon the Trustee to pursue the recovery of these premiums or any other amounts from Union Planters' collateral. *Brief for Petitioner*, p. 5, n.4.[2]

Union Planters objected to Hartford's Application, contending, *inter alia*, that because Hartford was not a "trustee", it was not entitled to pursue a right of recovery under Bankruptcy Code Section 506(c). App. 212a-214a. Ruling in favor of Hartford, the Bankruptcy Court stated that it could not consider the latter issue because it was required to follow the holding in *United States, Internal*

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[2] Citing to *United States, Internal Revenue Service v. Boatmen's First National Bank of Kansas City*, 5 F.3d 1157 (8th Cir. 1993), Hartford asserts that it "did not request the trustee to pursue its claim under section 506(c) because the law in the Eighth Circuit *as it existed at that time* permitted administrative claimants to pursue such claims on their own behalf." *Brief for Petitioner*, p. 5, n.4 (emphasis added). However, the *Boatmen's* decision was not issued until September 23, 1993—more than a month and a half after Hartford filed its Application with the Bankruptcy Court. Prior to the *Boatmen's* decision, there was no controlling precedent in the Eighth Circuit on this issue and this issue had been raised and was being contested in the bankruptcy case below at the time the *Boatmen's* decision was rendered.

Revenue Service v. Boatmen's First National Bank of Kansas City, 5 F.3d 1157, 1159 (8th Cir. 1993), wherein a divided panel of the Eighth Circuit Court of Appeals held that third party claimants may pursue a private right of recovery under Bankruptcy Code Section 506(c). App. 255a-256a. Following the Bankruptcy Court's decision, Union Planters appealed to United States District Court for the Eastern District of Missouri (the "District Court"), which similarly stated that it was required to follow the *Boatmen's* holding. App. 273a.

Union Planters then appealed to the Eighth Circuit Court of Appeals, where a three member panel stated that it was also required to follow the *Boatmen's* holding because "only the court en banc can overrule another panel's decision." App. 290a (*quoting Smith v. Copeland*, 87 F.3d 265, 269 (8th Cir. 1996)).

Upon Union Planters' motion for rehearing, however, the Eighth Circuit Court of Appeals, sitting *en banc*, reversed the decisions below. In doing so, the Circuit Court expressly overruled the *Boatmen's* decision and held that under its plain and unambiguous terms, Bankruptcy Code Section 506(c) does not provide for a right of recovery in favor of third party claimants such as Hartford. App. 302a-305a.

Following this decision, Hartford filed a Petition for Certiorari with this Court, which was granted on November 8, 1999.

SUMMARY OF ARGUMENT

Under its plain and unambiguous terms, Bankruptcy Code Section 506(c) only creates a right of recovery in favor of the "trustee."[3] Given the certainty and clarity

[3] Pursuant to the provisions of Bankruptcy Code Section 1107, a debtor-in-possesssion in a Chapter 11 proceeding is expressly given the rights and powers of a trustee and, thus, is clearly entitled to pursue a surcharge claim on behalf of the bankruptcy estate under Bankruptcy Code Section 506(c). *See* 11 U.S.C. § 1107. In contrast, there is no provision in the Bankruptcy Code expressly authorizing third party claimants to exercise the trustee's powers under Section 506(c). For ease of reference and in recognition that the present controversy did not arise until after the Debtor's Chapter 11 proceedings were converted to Chapter 7, the right of surcharge under Section 506(c) will generally be referred to herein as a right existing in favor of the trustee—even though it is clear that pursuant to the provisions of Bankruptcy Code Section 1107, that right also exists in favor of a Chapter 11 debtor-in-possession.

of the statutory text, the only way to find authority for permitting a third party claimant such as Hartford to pursue a right of recovery under Section 506(c) is to add language to the statute that Congress clearly chose not to include.

As is the case with the other rights and powers created in favor of the trustee, when a trustee pursues a right of recovery under Bankruptcy Code Section 506(c), she does so for the collective benefit of all creditors. Thus, any amounts recovered by a trustee under Section 506(c) become part of the bankruptcy estate and are distributed in accordance with the Bankruptcy Code's priority and distribution provisions.

In contrast, Hartford seeks to proceed under Section 506(c) solely on its own behalf rather than on behalf of the bankruptcy estate. Thus, if Hartford is permitted to recover under Section 506(c), the amounts recovered will not become part of the bankruptcy estate or otherwise be shared with other unpaid administrative claimants. Instead, Hartford will retain these amounts for its own exclusive benefit.

Not only is such a result completely incompatible with bankruptcy's function as a collective debt collection procedure, it also would severely undermine the Bankruptcy Code's carefully crafted priority and distribution provisions.

While Hartford maintains that it is necessary to allow third party claimants such as itself to proceed under

Bankruptcy Section 506(c) because trustees often lack sufficient incentive to do so, Hartford disregards the fact that trustees have a fiduciary duty to maximize the assets of the bankruptcy estate and, thus, are legally obligated to pursue those surcharge recoveries that they believe are meritorious and will ultimately benefit the bankruptcy estate. Moreover, notwithstanding its repeated complaints about the alleged lack of incentive on the part of trustees, Hartford concedes that in the instant case it never requested that the Trustee attempt to recover the amounts presently at issue.

Similarly, while Hartford voices concern about the alleged "windfall" secured creditors will realize if third party claimants are not allowed to pursue private rights of recovery under Section 506(c), it is apparent there are many available means by which parties in Hartford's position can protect themselves against the risks of nonpayment. Having failed to avail itself of any of these protections, Hartford cannot now recast Section 506(c) as creating a private federal cause of action pursuant to which it is entitled to hold Union Planters liable for the unpaid insurance premiums owed by the Debtor.

In any event, if Hartford believes that there are policy reasons favoring allowance of private surcharge rights against secured creditors, it should address these concerns before Congress rather than ask this Court to disregard Bankruptcy Code Section 506(c)'s clear and unambiguous language.

Because the language of Bankruptcy Code Section 506(c) is plain and unambiguous, it is neither necessary nor appropriate to consider the statute's legislative history. Nonetheless, because it repeatedly and exclusively refers to Section 506(c) as a remedy existing solely in favor of the trustee or debtor-in-possession, the legislative history

to Section 506(c) merely reinforces the propriety of construing the statute in accordance with its plain meaning.

Confronted by Section 506(c)'s plain and unambiguous language—and a legislative history that reinforces that plain and unambiguous language—Hartford seeks to find support for its position in "pre-Code practice"—that is, the practice that existed prior to the adoption of the Bankruptcy Code in 1978. As this Court has repeatedly recognized, it is not appropriate to consider pre-Code practice in situations such as the present where both the statute and legislative history are clear and unambiguous. Nonetheless, even if one were to consider pre-Code practice relating to surcharge recovery issues, it is evident that far from evidencing a clearly defined and well-established rule of law, pre-Code practice, at the very most, implicated certain broad and loosely defined concepts that have little relevance to and provide no meaningful insight into the workings of the modern day Bankruptcy Code.

Finally, Debtor mistakenly attempts to rely on this Court's jurisprudence regarding the doctrine of standing. Standing, in the technical and traditional sense, concerns whether a party has a sufficient stake in the outcome of a case so that it can be relied upon to present a justifiable case or controversy. In contrast, the issue in this case is whether Hartford has a right of recovery under Bankruptcy Code Section 506(c). Thus, Hartford may be entirely correct that if Section 506(c) created a private right of recovery in favor of administrative claimants, it would have standing to assert that right. Nevertheless, as is evident from the statute's plain language, its legislative history and the overall structure and purpose of the Bankruptcy Code, no such right exists in the first instance.

ARGUMENT

I. UNDER ITS CLEAR AND UNAMBIGUOUS TERMS, BANKRUPTCY CODE SECTION 506(c) DOES NOT GIVE UNPAID ADMINISTRATIVE CLAIMANTS A PRIVATE RIGHT OF RECOVERY AGAINST THE COLLATERAL OF A SECURED CREDITOR

A. The Language of the Statute Is Plain and Unambiguous

The proper construction of any statute must begin "with the language of the statute itself." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030 (1989). If the provisions of the statute are clear and unambiguous, "the sole function of the courts is to enforce it according to its terms." *Id.* Indeed, this is a fundamental precept to which this Court has consistently adhered in construing the provisions of the Bankruptcy Code. *See, e.g., Rake v. Wade*, 508 U.S. 464, 471, 113 S.Ct. 2187, 2191 (1993); *Patterson v. Shumate*, 504 U.S. 753, 761, 112 S.Ct. 2242, 2248 (1992); *Toibb v. Radloff*, 501 U.S. 157, 162, 111 S.Ct. 2197, 2200 (1991).

Looking to Bankruptcy Code Section 506(c), the plain and unambiguous language of the statute does not create a right of recovery in favor of any party other than "the trustee." *See, e.g., In re Hen House Interstate, Inc.*, 177 F.3d 719, 723 (8th Cir. 1999) (*en banc*) ("The natural reading of § 506(c) entitles only the trustee to seek to surcharge property securing the claim of an allowed secured creditor under that section."); *Ford Motor Credit Company v. Reynolds & Reynolds Company (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 484 (4th Cir. 1994) (language of Section 506(c) is "clear and unambiguous."). Thus, "[t]here is no reference in the statute to any 'affected entity', 'aggrieved entity', or other parties." *Williams v. Bank One Cleveland, N.A. (In re Dyac Corporation)*, 164 B.R. 574, 579 (Bankr. N.D. Ohio 1994);

Boyd v. Dock's Corner Associates (Matter of Great Northern Forest), 135 B.R. 46, 65 (Bankr. W.D. Mich. 1991).

Instead, Section 506(c) singularly and exclusively identifies the trustee as the proper party to pursue the right of recovery created under the subsection. *See Peidmont Farm Credit, ACA v. G & M Milling Company (In re Caldwell)*, 147 B.R. 119, 120 (M.D.N.C. 1992) ("the express language is clear and unambiguous—that 'trustee' does in fact mean 'trustee.' "). Indeed, this is a point acknowledged even by those courts that have nonetheless permitted third parties to pursue individual recoveries under Section 506(c). *See, e.g., Precision Steel Shearing, Inc. v. Fremont Financial Corporation (In re Visual Industries, Inc.)*, 57 F.3d 321, 325 (1st Cir. 1995) (allowing administrative claimant to pursue individual recovery under Section 506(c) "[a]lthough § 506(c) in terms only refers to recovery by the trustee"); *North County Jeep and Renault, Inc. v. General Electric Capital Corporation (In re Palomar Truck Corporation)*, 951 F.2d 229, 231-2 (9th Cir. 1991) (permitting administrative claimant to pursue individual recovery under Section 506(c) but acknowledging "the seemingly categorical statutory language confining the remedy to trustees"); *New Orleans Public Service, Inc. v. First Federal Savings and Loan Association of Warner Robins, Georgia (Matter of Delta Towers, Ltd.)*, 924 F.2d 74, 76 (5th Cir. 1991) (permitting administrative claimant to pursue individual recovery under Section 506(c) notwithstanding the statute's "seemingly unambiguous language.").

There is nothing in the structure or the syntax of Section 506(c) that in any way suggests that Congress's singular selection of the word "trustee" was unintentional or that its omission of any other parties was inadvertent. On the contrary, the trustee is the sole and exclusive subject upon

which the entire remaining text of Section 506(c) is predicated.

Given the clarity and deliberateness of the relevant text, it is evident that the only way to find authority to allow third party claimants such as Hartford to pursue individual recoveries under Section 506(c) is "to begin inserting additional words and clauses that Congress has not seen fit to put in the [Bankruptcy] Code." *Central States, Southeast Southwest Areas Pension Fund v. Robbins (In re Interstate Motor Freight Systems IMFS, Inc.)*, 86 B.R. 500, 503 (Bankr. W.D.Mich. 1988). This, of course, would constitute a direct usurpation of the legislative function—a practice this Court has categorically condemned. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 644-5, 112 S.Ct. 1644, 1648-9 (1992) (noting that it is Congress—and not the Court—that has authority to add a "good faith limitation" to Bankruptcy Code Section 522(l)).

B. To the Extent Congress Wanted to Permit Third Parties to Exercise Any of the Rights and Powers Created in Favor of the Trustee, It Did so Expressly

The appropriateness of construing Bankruptcy Code Section 506(c) in accordance with its plain and unambiguous terms is reinforced by the fact that when Congress wanted to permit third parties to exercise any of the substantive rights and powers created in favor of the trustee, it did so by using explicit and precise language. Thus, for example, in Bankruptcy Code Section 522(h), Congress expressly grants individual debtors a qualified right to use certain of the trustee's "avoidance powers" (such as, the power to avoid preferential transfers under Bankruptcy Code Section 547) to recover property that is subject to exemption under Bankruptcy Code Section 522(b). Although the trustee is clearly empowered to recover such property, Congress recognized that a trustee

will often "have little incentive to recover assets which [ultimately do not] go to creditors." *Deel Rent-a-Car, Inc. v. Levine*, 721 F.2d 750, 757 (11th Cir. 1983). Accordingly, Section 522(h) expressly authorizes a debtor to exercise a trustee's avoidance powers to recover exempt property in the event the trustee fails to do so.

While Hartford asserts similar concerns about the trustee's alleged lack of incentive to pursue recoveries under Bankruptcy Code Section 506(c), Congress did not share these concerns in framing the language of Section 506(c). Consequently, in contrast to the express authorization afforded under Section 522(h), the Bankruptcy Code is devoid of any language authorizing third parties claimants such as Hartford to exercise the trustee's right to seek surcharge recoveries under Section 506(c).

In addition to Bankruptcy Code Section 522(h), there are several other examples in the Bankruptcy Code where Congress expressly authorized a third party to utilize one or more of the rights and powers created in favor of the trustee. Thus, for instance, Bankruptcy Code Section 1303 expressly authorizes a Chapter 13 debtor to exercise (to the exclusion of the trustee) certain of the trustee's rights to use, sell or lease property of the bankruptcy estate under Bankruptcy Code Section 363. *See also* 11 U.S.C. § 1304 (expressly granting certain Chapter 13 debtors a qualified right to exercise certain of the trustee's rights and powers under Bankruptcy Code Section 363(c) and Bankruptcy Code Section 364). Similarly, Bankruptcy Code Section 1107(a) expressly authorizes a Chapter 11 debtor-in-possession to exercise all of the rights and powers of the trustee except for the right to receive compensation under Bankruptcy Code Section 330. *See also* 11 U.S.C. § 902(5) (generally authorizing a municipal debtor in a Chapter 9 bankruptcy proceeding to exercise the rights and powers of a trustee);

11 U.S.C. § 1203 (expressly conferring upon a Chapter 12 debtor all of the rights and powers of a trustee except for the right to receive compensation under Bankruptcy Code Section 330).

As the foregoing provisions demonstrate, to the extent Congress recognized a need for allowing third parties to utilize the substantive rights and powers created in favor of the trustee, it expressly provided for it. Undeniably, there is no such express authorization permitting administrative claimants such as Hartford to utilize the trustee's rights under Section 506(c). *See BFP v. Resolution Trust Corporation*, 511 U.S. 531, 537, 114 S.Ct. 1757, 1761 (1994) (citations omitted) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits in another").

C. Hartford Seeks to Manufacture Ambiguity Where None Exists

Refusing to acknowledge Section 506(c)'s plain and unambiguous language, Hartford attacks the Court below for invoking the ancient maxim *expressio unius est alterius exclusio*—a canon of construction to which this Court has frequently cited and relied throughout its history. *See, e.g., Marbury v. Madison*, 5 U.S. 137, 174-5, 2 L. Ed. 60, 70 (1803) ("Affirmative words are often, in their operation, negative of other objects than those affirmed. . ."). As an alternative method of interpretation, Hartford urges the Court to engage in the seemingly metaphysical exercise of listening attentively to what Section 506(c) does not say. *See* Brief for Petitioner, p. 29. Specifically, Hartford contends that "what [ultimately] matters is that section 506(c) does not say that 'only' a trustee may enforce its provisions." *Id.* In an attempt to support this point, Hartford cites to a series of different provisions in the Bankruptcy Code in which Congress em-

ployed the qualifier "only" when identifying certain parties or expressly excluded certain parties from requesting different types of relief.

In contrast to Section 506(c), however, the provisions cited and relied upon by Hartford—with two notable exceptions [4]—do not involve any of the rights and powers created in favor of a bankruptcy trustee but instead, generally concern various administrative and procedural matters with respect to which the inclusion of the term "only" or other qualifying language is dictated by the context or purpose of the provision.[5] As is uniformly exhibited throughout the Bankruptcy Code, when establishing rights and powers in favor of the trustee, Congress did not undertake the profoundly unnecessary step—now deemed essential by Hartford—of inserting language expressly precluding third party claimants from exercising those same rights and powers.

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[4] The two exceptions are: Bankruptcy Code Section 1303 and Bankruptcy Code Section 1304. As fully described above, however, far from supporting Hartford's position, these provisions illustrate the point that when Congress wanted to permit third parties to exercise rights and powers created in favor of a trustee, it did so expressly.

[5] Thus, Hartford cites to: (a) Bankruptcy Code Section 109—a provision identifying who is eligible to be a debtor under different Chapters of the Bankruptcy Code; (b) Bankruptcy Code Section 303(a)—a provision identifying the parties that may be subject to an involuntary bankruptcy filing; (c) Bankruptcy Code Section 307—a provision describing the Office of U.S. Trustee's right to be heard on certain matters; (d) Bankruptcy Code Section 341(c)—a provision clarifying that bankruptcy judges are not to conduct or attend creditor's meetings; (e) Bankruptcy Code Section 702(a)—a provision identifying the creditors eligible to vote on the election of a Chapter 7 trustee; (f) Bankruptcy Code Section 706(c)—a provision giving the debtor the right to convert certain proceedings to another Chapter of the Bankruptcy Code; (g) Bankruptcy Code Section 1109(a)—a provision giving the Securities and Exchange Commission a qualified right to be heard in Chapter 11 proceedings; (h) Bankruptcy Code Section 1112—a provision giving the debtor

Thus, for example, under the provisions of Bankruptcy Code Section 547(b), the trustee is given the power to "avoid" certain transfers made by the debtor within the ninety day period preceding the commencement of a bankruptcy proceeding. 11 U.S.C. § 547(b). Bankruptcy Code Section 547, however, does not expressly state that this power is to be exercised "solely" by the trustee or that it is a power existing in favor of "the trustee and only the trustee." Instead, like Section 506(c), Bankruptcy Code Section 547 simply identifies the avoidance of preferential transfers as a power to be exercised by "the trustee." *See* 11 U.S.C. § 547(b) ("the trustee may avoid. . ."). Nevertheless, it is clear that notwithstanding the fact that Bankruptcy Code Section 547 does not say "only" the trustee may bring preference actions, individual claimants do not have an independent right to bring preference actions and retain any resulting recovery for their own exclusive benefit (as Hartford proposes to do under Section 506(c) in the instant case).[6]

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the ability to convert a Chapter 11 proceeding to different Chapters under the Bankruptcy Code; (i) Bankruptcy Code Section 1121—a provision giving a Chapter 11 debtor-in-possession a qualified right to be the only party that files and seeks the confirmation of a Chapter 11 plan; (j) Bankruptcy Code Section 1164—a provision giving certain governmental agencies a limited right to be heard in a railroad reorganization; and (k) Bankruptcy Code Section 1307(c)(9) and (10)—provisions authorizing the Office of the U.S. Trustee to seek the dismissal of certain Chapter 13 proceedings.

[6] In their *Amici* Brief, the American Insurance Association and National Union Fire Insurance Company of Pittsburgh, Pa. cite to a series of cases in support of the assertion that in accordance with the omission of the word "only" or similar qualifying language in Bankruptcy Code Section 547 and the Bankruptcy Code's other avoidance power provisions, the majority of circuit courts "have held that creditors and their committees may bring such avoidance actions." Brief of *Amici Curiae*, pp. 16-17. Without exception, however, the cases cited by *amici curiae* all involve situations in which the trustee or the Chapter 11 debtor-in-possession refused to bring an avoidance action and, in response, the court granted (or recognized its ability to grant) so-called "derivative standing" to a creditor or creditors' committee to pursue the avoidance action *on behalf of the bankruptcy estate. See Canadian Pacific Forest Products Ltd. v. J.D. Irving, Ltd. (In re Gibson Group, Inc.)*, 66 F.3d 1436, 1446 (6th Cir. 1995) (setting forth detailed steps that must be followed before creditor or creditors' committee can obtain derivative standing to bring avoidance action on behalf of the estate); *Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1363 (5th Cir. 1986) (noting that unsecured creditors committee could bring preference action if Chapter 11 debtor in possession failed to do so); *Unsecured Creditors Committee of Debtor STN Enterprises, Inc. v. Noyes (In re STN Enterprises)*, 779 F.2d 901, 904 (2d Cir. 1985) (committee may obtain derivative standing to bring preference action when trustee or Chapter 11 debtor in possession unjustifiably fails to do so); *Official Unsecured Creditors Committee of Suffola, Inc. v. U.S. National Bank (In re Suffola, Inc.)*, 2 F.3d 977, 979 n.1 (9th Cir. 1993) (same); *see also In re Groves Farms, Inc.*, 64 B.R. 276, 277 (Bankr. S.D. Ind. 1986) (wherein the court, in refusing to allow administrative claimant to pursue private right of recovery under Section 506(c), observed that "[i]n all of those situations known to this Court, where the express language of the Code has been ignored to allow some non-trustee or non-debtor to assert a right [of the trustee], the actions of that non-trustee or non-debtor were aimed at benefiting the estate and all creditors.").

Similarly, Bankruptcy Code Section 363 gives the trustee the power to use, sell or lease property of the bankruptcy. Like Section 506(c), however, Bankruptcy

Unlike the parties in the cases cited by *amici curiae*, Hartford is not seeking "derivative standing" to assert a surcharge claim on behalf of the bankruptcy estate. Instead, it is seeking to pursue a private right of recovery under Section 506(c) which, if successfully asserted, will inure to its sole and exclusive benefit. As several authorities have observed, it is the failure to recognize this critical and fundamental distinction—that is, between derivative standing on the one hand and allowing a creditor to pursue a private right of recovery on the other—that has caused many courts and litigants to erroneously conclude that third party administrative claimants should be allowed to proceed under Section 506(c). *See, e.g., Piedmont Farm Credit, ACA v. G & M Milling Company (In re Caldwell)*, 147 B.R. 119, 121 (M.D.N.C. 1992) ("The circuit court cases fail to recognize the distinction between derivative and independent standing"); *Boyd v. Dock's Corner Associates (Matter*

Code Section 363 does not say "only" the trustee has the right to use, sell or lease property of the bankruptcy estate. *See, e.g.*, 11 U.S.C. § 363(b) ("the trustee, after notice and a hearing, may use, sell, or lease, . . ."). Again, however, it cannot be seriously suggested that because Bankruptcy Code Section 363 does not refer to "only" the trustee, creditors and administrative claimants also have the right to use, sell or lease property of the bankruptcy estate and may do so for their own private benefit.[7]

The reason it was unnecesary for Congress to include express "words of preclusion" in the various provisions setting forth the rights and powers of a trustee is self-evident when one considers the unique role the trustee occupies in the overall scheme and purpose of bankruptcy

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of Great Northern Forest Products, Inc.), 135 B.R. 46, 68 (Bankr. W.D. Mich. 1991) (noting critical distinction "between independent and derivative standing to assert a trustee's cause of action."); L. Snider and K. Noble, *Standing to Surcharge the Secured Creditor: Policy, Plain Meaning, and Payment Under Section 506(c) of the Bankruptcy Code*, 5 J. Bankr. L. & Prac. 301, 308 (March/April 1996) ("Courts that have granted standing to unpaid administrative claimants have failed to distinguish between direct and derivative standing."). While one may at least debate whether the concept of derivative standing is consistent with the plain and unambiguous language of Section 506(c), the same argument cannot obtain with respect to an alleged private right of recovery under Section 506(c).

[7] *See also* 11 U.S.C. § 364 (giving the trustee the power to incur debt on behalf of the bankruptcy estate, but not providing that "only" the trustee may exercise this power); 11 U.S.C. § 365 (giving the trustee the power to assume or reject the debtor's "executory contracts" and unexpired leases, but not providing that "only" the trustee may exercise this power); 11 U.S.C. §§ 544, 548, 549 and 553 (giving the trustee various powers to avoid different types of transfers, but not providing that "only" the trustee may exercise these powers), 11 U.S.C. § 554 (giving the trustee the power to abandon property of the bankruptcy estate, but not providing that "only" the trustee may exercise this power.)

law. Specifically, bankruptcy law is premised upon on the central concern that the system of individual creditor remedies that exists outside of bankruptcy "may be bad for the creditors as a group when there are not enough assets to go around." T. Jackson, *The Logic and Limits of Bankruptcy Law*, p. 10 (1986). To address this problem, "the bankruptcy process substitutes collective creditor conduct [in place of] unilateral creditor action." *Foster Development Corporation v. Morning Treat Coffee Company, Inc. (In re Morning Treat Coffee Company, Inc.)*, 77 B.R. 62, 65, n.6 (Bankr. M.D. La. 1987). Thus, instead of allowing each creditor to pursue its own individual collection efforts, bankruptcy provides for the appointment of a trustee who is charged with the responsibility of seeking to maximize the total pool of assets available to the creditor body as a whole. *See* 11 U.S.C. § 704(1); *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 352, 105 S.Ct. 1986, 1992 (1985) ("The trustee. . . has the duty to maximize the value of the estate").

As part of this process, the trustee is given various rights and powers which are designed to assist in maximizing the assets generally available to creditors. Obviously, it would be entirely antithetical to bankruptcy's function as a collective debt collection procedure if these very same rights and powers—rights and powers which the trustee must exercise for the collective benefit of all creditors—were also made available to individual creditors to utilize for the collection of their individual claims.[8] Thus, it was unnecessary, and would have been

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[8] Recognizing the inherent contradiction in allowing individual creditors to utilize the trustee's rights and powers to pursue their own individual recoveries, many authorities have criticized those decisions permitting third party claimants to proceed under Section 506(c) on the basis that the courts in those decisions are, in effect, promoting a return to the very circumstances that bankruptcy is

patently redundant, for Congress to include in the various sections of the Bankruptcy Code setting forth the trustee's substantive rights and powers—including Section 506(c) —language expressly precluding individual creditors from utilizing those same rights and powers to pursue the recovery of their individual claims. Indeed, Hartford's effort to attach significance to the absence of such language in Section 506(c) must ultimately be seen as a transparent attempt to create ambiguity where it unmistakably does not exist.

D. In Contrast to the Proposed Construction Advanced by Hartford, a Plain Meaning Construction of Section 506(c) Is Fully Consistent With the Bankruptcy Code's Priority and Distribution Provisions

As this Court recognized in *Beiger v. I.R.S.*, 496 U.S. 53, 58, 110 S.Ct. 2258, 2262-3 (1990), one of the Bankruptcy Code's primary goals is "[e]quality of distribution among creditors." Specifically, the Bankruptcy Code seeks to insure that "creditors of equal priority . . . receive pro rata shares of the debtor's property." *Id.*

Allowing a trustee to recover certain administrative expenses from a secured creditor's collateral under Section

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designed to ameliorate, that is, a creditor "free for all" in which individual creditors vie against one another to realize against the debtor's limited assets. *See, e.g., Dock's Corner Associates v. Boyd (Matter of Great Northern Forest Products, Inc.)*, 135 B.R. 46, 69 (Bankr. W.D. Mich. 1991) ("[t]aking the holding in McKeesport to its logical extreme, every unpaid administrative claimant could sue a secured creditor under § 506(c) to seek to recover asserted costs or expenses [and] . . . [a]ny successful recovery would benefit the individual claimant . . . Such an interpretation may willy-nilly spawn satellite actions resulting in a litigation free for all"). The latter concern is borne out by such cases as *Matter of Bluffton Castings Corporation*, 224 B.R. 902 (Bankr. N.D. Ind. 1998) (wherein a Chapter 7 trustee was forced to compete against two administrative claimants—who, like Hartford, were seeking to recovery solely for themselves—to collect certain surcharge recoveries under Section 506(c)).

506(c) is entirely consistent with this policy, for any amounts recovered by a trustee under Section 506(c) become part of the bankruptcy estate and must be distributed evenly among creditors according to the relative priorities of their claims. *See, e.g., Matter of Oakland Care Center, Inc.*, 142 B.R. 791, 794 (E.D. Mich. 1992) ("When a trustee or debtor in possession recovers a claim under section 506(c), the recovery becomes property of the estate under section 541(a)(7).").

The same is not true, however, if a third party claimant such as Hartford is permitted to pursue an individual right of recovery under Section 506(c). Specifically, because such a claimant is acting on its own behalf rather than on behalf of the bankruptcy estate, none of the amounts it recovers are distributed or otherwise shared with any of the other administrative expense claimants of the bankruptcy estate. Instead, the administrative claimant retains the resulting recovery for its sole and exclusive benefit (as Hartford proposes to do in this case).

As both the court below and numerous other courts have recognized, this will often mean that if permitted to proceed under Section 506(c), third party claimants such as Hartford may recover in full while other administrative claimants receive considerably less or, possibly, nothing. *Ford Motor Credit Company v. Reynolds & Reynolds Company (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 484 (4th Cir. 1994) ("if an estate has no unencumbered assets, an administrative claimant recovering directly from a secured creditor might receive full reimbursement while other administrative claimants, whose services were also necessary to the preservation of the estate, would receive nothing."). Unquestionably, such a result contradicts the Bankruptcy Code's goal of promoting equal distribution among similarly situated credi-

tors, for there is nothing in the Bankruptcy Code that creates a special priority in favor of administrative expense claimants whose goods and services benefit a secured creditor's collateral.[9] *Central States, Southeast and Southwest Areas Pension Fund v. Robbins (In re Interstate Motor Freight Systems IMFS, Inc.)*, 86 B.R. 500, 504 (Bankr. W.D. Mich. 1988) ("No Code section distinguishes between administrative claimants . . . whose credit benefited a secured creditor and those whose credit benefited the estate generally.").

The foregoing problem is exacerbated in situations like the present where the bankruptcy case has been converted from a Chapter 11 proceeding to a Chapter 7 proceeding. Specifically, when a case is converted from a Chapter 11 to a Chapter 7 proceeding, Bankruptcy Code Section 726(b) provides that administrative expense claims of the Chapter 7 proceeding are to be paid in full before there is any distribution to the Chapter 11 claimants. If, however, Chapter 11 administrative claimants such as Hartford are permitted to pursue private rights of recovery under Section 506(c), they can effectively turn this distribution rule on its head. Specifically, by recovering under Section 506(c), Hartford and other similarly situated claimants may be able to obtain payment in full while legitimate administrative expenses of the Chapter 7 proceeding remain partially or completely unpaid. *See Central States, Southeast, and Southwest Areas Pension Fund v. Robbins (In re Interstate Motor Freight System IMFS, Inc.)*, 71 B.R. 741, 744 (Bankr. W.D. Mich. 1987) ("to permit a Chapter 11 administrative expense claimant to recover its claim while Chapter 7 administrative claimants . . .

[9] Hartford contends that such a special priority exists under the provisions of Bankruptcy Code Section 506(c). As more fully discussed *infra.*, this contention is devoid of any textual support and directly contradicts the express terms of the Bankruptcy Code's priority and distribution provisions.

go unpaid . . . would be a violation of § 726(b)."); *In re J.R. Research, Inc.*, 65 B.R. 747, 751 (Bankr. D. Utah 1986) ("This Court cannot in good conscience allow [parties] to circumvent the priority scheme set forth by Congress in § 726(b).").[10]

E. Hartford's Characterization of Bankruptcy Code Section 506(c) as a "Priority Provision" Is an Implausible Construction That Is Not Only Devoid of Any Textual Basis But Directly Conflicts With the Bankruptcy Code's Priority and Distribution Provisions

Far from denying the foregoing analysis, Hartford fully acknowledges that if allowed to proceed under Section 506(c), administrative claimants such as itself may be able to recover in full while other administrative claimants—potentially including administrative claimants of the Chapter 7 estate—recover nothing. Nonetheless, Hartford maintains that this result is exactly what Congress intended, for—according to Hartford—Section 506(c) is really a "priority provision." *Brief for Petitioner*, p. 11. Indeed, under Hartford's construction, even when a trustee successfully recovers under Section 506(c), the

[10] The pernicious effect that Hartford's proposed construction of Section 506(c) has on the Bankruptcy Code's priority scheme and the Bankruptcy Code's overall function as a collective debt collection procedure is well-illustrated by cases such as *Matter of Bluffton Castings Corporation*, 224 B.R. 902 (Bankr. N.D. Ind. 1998), wherein a Chapter 7 trustee was forced to compete against two administrative claimants to recover certain expenses from a secured creditor's collateral under Section 506(c). While the trustee sought to recover the expenses on behalf of the bankruptcy estate so that the resulting recovery could be distributed to all creditors in accordance with the Bankruptcy Code's priority and distribution provisions, the administrative claimants (like Hartford in the instant case) made clear that they intended to apply any amounts they recovered solely to their own claims. Dismissing the administrative claimants' action, the *Bluffton* court correctly concluded that the right of recovery under Section 506(c) exists only in favor of the Chapter 7 trustee as the representative of all creditors. *Id.*, at 904-5.

resulting proceeds should not be distributed along with the other assets of the estate but, rather, earmarked and paid directly to the administrative claimant whose goods or services gave rise to the surcharge claim.

This proposed construction is both conceptually and textually untenable. First, Hartford's assertion that a trustee pursues surcharge recoveries under Section 506(c) for the benefit of particular administrative claimants is irreconcilable with the fundamental nature and role of the trustee. As noted above, the trustee serves as "the representative of the [bankruptcy] estate." 11 U.S.C. § 323(a). As such, the trustee must act for the collective benefit of all creditors "and not on behalf of any individual creditor." *In re Bell & Beckwith*, 50 B.R. 422, 434 (Bankr. N.D. Ohio 1985); *In re Gallagher*, 70 B.R. 288, 290 (Bankr. S.D. Tex. 1987) ("A Trustee may not act on behalf of any particular creditor since she is a representative of the estate."). Thus, courts have consistently held that a trustee may not pursue "personal claims of creditors." *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1348 (7th Cir. 1987); *Mixon v. Anderson (In re Ozark Restaurant Equipment Co., Inc.)*, 816 F.2d 1222, 1228 (8th Cir. 1987) (there is nothing in "the liquidation framework of the [Bankruptcy Code] authorizing a Chapter 7 trustee to collect money not owed to the estate."); *see also Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 92 S.Ct. 1678 (1972) (Reorganization trustee under Chapter X of former Bankruptcy Act could not pursue claims on behalf of individual debenture holders); *but see In re McKeesport Steel Castings Co.*, 799 F.2d 91, 93-4 (3rd Cir. 1986) (supporting view that amounts recovered by trustee under Section 506(c) are paid over to the administrative claimant whose goods or services gave rise to the surcharge claim). Under Hartford's proposed construction of Section 506(c), however, the trustee would be pursuing a recovery solely for

the benefit of an administrative claimant such as Hartford.[11] *Central States, Southeast and Southwest Areas Pension Fund v. Robbins (In re Interstate Motor Freight Systems IMFS, Inc.)*, 86 B.R. 500, 506 (Bankr. W.D. Mich. 1988) ("allowing use of powers created by the Bankruptcy Code for the benefit of one creditor alone [is] a result to be avoided.").

Also in keeping with the trustee's role as the estate representative, it is well established that any monies recovered by a trustee are for the collective benefit of all creditors (rather than any individual creditor) and, as such, must be distributed on a pro-rata basis in accordance with the Bankruptcy Code's priority and distribution schemes. Indeed, this principle dates back to this Court's ruling in *Moore v. Bay*, 284 U.S. 4, 52 S.Ct. 3 (1931), where the Court held that certain property recovered by a trustee had to be administered for the pro-rata benefit of all creditors, even though the trustee recovered the property by utilizing the lien avoidance rights of certain individual creditors. As modern courts have recognized, the holding in *Moore v. Bay* has been incorporated in the Bankruptcy Code and mandates that property recovered by a trustee "be treated like any other asset of the estate,

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11 As one commentator has observed, if taken to its logical conclusion, the proposed construction being advanced by Hartford would require that a surcharge action brought by a trustee be dismissed for "lacking of standing" as the trustee does not have authority to proceed on behalf of one creditor. *See* G. Hesse, *One Statute, Three Disparate Interpretations: Standing to Pursue Recovery From A Secured Creditor Pursuant to Bankruptcy Code Section 506(c)*, 47 Baylor L. Rev. 39, 54-5 (1995) ("the McKeesport line of cases wrongly assumes that the monies recovered from a surcharge of the collateral of the secured creditor will be earmarked for payment to a specific administrative claimant . . . if a court were to follow the McKeesport rationale to its logical conclusion, it should deny standing to the trustee attempting to sue under Section 506(c) because the trustee would not profit from the action.").

to be distributed pro rata to all creditors under the bankruptcy distribution scheme." *In re Boyd*, 121 B.R. 622, 625 (Bankr. N.D. Fla. 1989); *Still v. Congress Financial Corporation (In re Southwest Equipment Rental, Inc.)*, 102 B.R. 132, 139 (E.D. Tenn. 1989); *In re Fiegaro*, 79 B.R. 914, 918 (Bankr. D. Nev. 1987) ("The law established in Moore is well settled, and has been clearly incorporated into the Bankruptcy Code."). Again, Hartford's proposed construction of Section 506(c)—under which a trustee's surcharge recoveries would be earmarked and paid to particular administrative claimants—would directly violate this fundamental principle.

Separate and apart from the above-referenced considerations, it is evident that Hartford's characterization of Section 506(c) as a priority provision is devoid of any textual basis or support. Thus, Section 506(c) does not identify or even reference the administrative claimants on whose behalf the alleged priority is created. Indeed, the only parties mentioned in Section 506(c) are the trustee and the secured creditor. Similarly, Section 506(c) does not contain any language regarding the relative priority of any claims or the manner in which any funds collected or recovered by the trustee are to be distributed.

In contrast, the subject of "priorities" is expressly and comprehensively addressed in Bankruptcy Code Section 507. *See U.S. v. Reorganized CF & I Fabricators of Utah Inc.*, 518 U.S. 213, 218, 116 S.Ct. 2106, 2110 (1996) ("The provisions for priorities among a bankrupt debtor's claimants are found in 11 U.S.C. § 507"). Specifically, Section 507 sets forth a very carefully crafted list of claims that are entitled to priority in a bankruptcy proceeding and defines the relative priority of these claims with respect to one another. Although Section 507 creates a priority in favor of administrative expense claimants (*see* 11 U.S.C. § 507(a)(1)), it does not recognize a special priority in favor of or otherwise distinguish in any way

those administrative expense claimants whose goods or services benefited a secured creditor's collateral. Significantly, however, Bankruptcy Code Section 507(b) does create a special priority rule for certain administrative expense claims arising as a result of a secured creditor's failure to receive "adequate protection." 11 U.S.C. § 507(b). As the latter provision demonstrates, when Congress wanted to create a unique priority rule in favor of a particular group of administrative expense claimants, it did so explicitly and definitively.

Similarly, Bankruptcy Code Section 726 expressly addresses the subject of "distribution" in a Chapter 7 proceeding. Again, while this section contains very detailed rules regarding the order in which funds are to be distributed to different claimants, it contains no reference whatsoever to any special distribution rule in favor of administrative claimants whose goods or services benefited a secured creditor's collateral. As noted above, however, Bankruptcy Code Section 726 does provide for a special distribution rule in favor of Chapter 7 administrative expense claimants when the bankruptcy case has been converted from another Chapter of the Bankruptcy Code (*see* 11 U.S.C. § 726(b))—again, demonstrating that when Congress wanted to create a special priority or distribution rule in favor of a particular group of administrative expense claimants, it expressly did so.

Thus, in short, Hartford posits that although Congress intended to establish a special priority and distribution rule in favor of administrative claimants such as itself, it did not place (or even so much as reference) that rule in any of the sections of the Bankruptcy Code expressly addressing those subjects. Instead, according to Hartford, Congress cryptically concealed the rule in a section of the Bankruptcy Code that contains no mention whatsoever of the parties who are the rule's purported beneficiaries. Clearly, there is no accepted canon of statutory construc-

tion that would permit such a tortured reading of the statute. It is apparent that what Hartford truly seeks is the establishment of a special "common law" rule of priority. Yet, as this Court has repeatedly recognized, the authority to establish such a rule lies not with the judiciary but with the legislative branch of government. *See U.S. v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 227, 116 S.Ct. 2106, 2114 (1996) ("categorical reordering of priorities that takes place at the legislative level of consideration is beyond the scope of judicial authority."); *U.S. v. Noland*, 517 U.S. 535, 541, 116 S.Ct. 1524, 1527 (1996) (reordering of statutory priorities "is a legislative type of decision").

Perhaps, most significantly, Hartford's proposed construction of Section 506(c) as a priority provision illustrates the dangers of not construing a statute as carefully and tightly crafted as the Bankruptcy Code in accordance with its plain meaning. Thus, while Hartford begins by asking the Court to look beyond the plain and unambiguous language of Section 506(c), it ultimately ends up insisting that the Court rewrite the Bankruptcy Code's priority and distribution provisions as well. In contrast, under a plain meaning construction of Section 506(c), the operation and effect of the Bankruptcy Code's priority and distribution provisions are fully honored and respected. *See U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 1030 (1988) ("as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.").

F. Even If It Were Applicable, Bankruptcy Code Section 1109(b) Does Not Provide A Basis For Disregarding Section 506(C)'s Clear And Unambiguous Terms

Hartford also attempts to circumvent Section 506(c)'s clear and unambiguous language by invoking the provisions

of Bankruptcy Code Section 1109(b), which give certain parties in a Chapter 11 proceeding a procedural right to "raise and [] appear and [] be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b). As the court below correctly concluded, Hartford's reliance on this provision is ill-founded, for Section 1109(b) is inapplicable to "the Chapter 7 proceeding which underlies this case." App., 302a.

Although Hartford continues to dispute the latter conclusion and insists that it should be allowed to invoke Section 1109(b) because its claim arose during the Chapter 11 proceeding, the fact remains that Section 1109(b) —by its very terms—only applies to issues in "a case under [Chapter 11]." Moreover, the inapplicability of Section 1109(b) is further reinforced by the provisions of Bankruptcy Code Section 103(f), which expressly provide that "subchapters I, II and III of chapter 11 of this title apply only in a case under such chapter." *See, e.g., In re Taylor & Associates, L.P.*, 191 B.R. 374, 381, n 5 (Bankr. E.D. Tenn. 1996).

Given the provision's obvious inapplicability, it is not surprising that Hartford failed to make any references whatsoever to Section 1109(b) in its original *Application for Allowance of Administrative Expense Pursuant to 11 U.S.C. Section 503 and Charge Against Collateral Pursuant to 11 U.S.C. Section 506(c).* App., 207a-211a.

More significantly, however, even if Hartford could properly invoke the provisions of Section 1109(b), these provisions clearly do not give Hartford the right to pursue substantive remedies to which it is otherwise not entitled —such as those set forth in Section 506(c). Section 1109(b) is designed to give certain parties in a Chapter 11 proceeding a *procedural* right to be heard on different issues. It does not, however, create any substantive rights (nor does it give those parties involved in a Chapter 11

proceeding a roving license to utilize for their own personal benefit the various substantive rights created in favor of the trustee and Chapter 11 debtor-in-possession). Indeed, this point is apparent even in the case cited and principally relied upon by Hartford—*Matter of James Wilson Associates*, 965 F.2d 160 (7th Cir. 1992)—wherein the court held that notwithstanding the provisions of Section 1109(b), a real estate mortgagee had no basis to complain about a Chapter 11 debtor-in-possession's failure to follow the appropriate procedural steps in assuming an unexpired lease under Bankruptcy Code Section 365. Of course, in the situation at hand, Hartford seeks to go several steps beyond the mortgagee in *James Wilson Associates* case—by not only directly exercising a power created in favor of the trustee, but also doing so for its sole and exclusive benefit.

G. The Claim Allowance Provisions Set Forth in Bankruptcy Code Section 502 Also Fail to Provide Any Basis for Disregarding Section 506(c)'s Plain and Unambiguous Terms

In a further effort to persuade the Court to look beyond Bankruptcy Code Section 506(c)'s plain and unambiguous terms, Hartford contends that it should be allowed to recover under Section 506(c) because pursuant to the provisions of Bankruptcy Code Section 502(a), it could have objected to the allowance of Union Planters' claim on the basis that Union Planters' collateral is subject to surcharge under Section 506(c). As with Hartford's reliance on Bankruptcy Code Section 1109(b), this argument is misplaced and lacks any statutory foundation.

First and most apparently, if Hartford believes that it could have obtained the very same relief it is currently seeking by exercising certain rights under Bankruptcy Code Section 502, then it should have exercised those

rights. Hartford cannot now use its failure to exercise whatever rights it believes it had under Section 502 (or any other provision) as a basis for obtaining authority to seek relief under a statutory provision that by its plain and unambiguous terms does not afford a right of recovery in favor of third party claimants such as Hartford.

Moreover, it is clear that Hartford's underlying premise —that it could have objected to the allowance of Union Planter's claim on the basis that Union Planters' collateral is subject to surcharge under Section 506(c)—is manifestly incorrect. As Hartford accurately notes, unlike Section 506(c), Bankruptcy Code Section 502(a) expressly authorizes any "party in interest" to object to the allowance of a claim. Bankruptcy Code Section 502, however, also sets forth a detailed and exhaustive list of the different grounds upon which claims may be disallowed. See 11 U.S.C. § 502(b)(1)-(9). Nowhere in the foregoing list is there any provision which provides for the disallowance of a secured claim because the secured creditor's collateral is subject to surcharge under Section 506 (c). In marked contrast, however, Bankruptcy Code Section 502(d) expressly provides for the disallowance of a claim on the basis that the creditor asserting the claim has failed to relinquish money and/or property subject to turnover, avoidance and/or recovery under Bankruptcy Code Sections 522, 542, 543, 544, 545, 547, 548, 549, 550, 553 or 724(a). Unquestionably, the conspicuous absence of an analogous provision regarding surcharge recoveries merely underscores the invalidity of Hartford's position.[12]

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12 Hartford's reliance on the claims allowance provisions is also misplaced from the standpoint that it has never contested or challenged the amount or validity of Union Planters' claim. See App. 254a. Indeed, if anything, the relief that Hartford is seeking is most closely analogous to the equitable subordination remedy set forth in Bankruptcy Code Section 510(c). Hartford did not invoke the latter provision nor could it have properly done so. *See In re Groves Farms, Inc.*, 64 B.R. 276, 277 (Bankr. S.D. Ind. 1986) (where

H. Alleged Policy Considerations Raised by Hartford Do Not Provide a Basis for Disregarding Section 506(c)'s Plain and Unambiguous Terms

As this Court has recognized time and again, when the language of a statute is plain and unambiguous, it is not permissible to consider alternative constructions based upon supposed policy and/or equitable considerations. Instead, the statute must be construed and applied "according to its terms." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030 (1989); *Rake v. Wade*, 508 U.S. 464, 471, 113 S.Ct. 2187, 2191 (1993); *see also Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 969 (1988) ("whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."); *National Labor Relations Board v. Bildisco and Bildisco*, 465 U.S. 513, 527, 104 S.Ct. 1188, 1196 (1984) ("The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity."). Thus, to the extent Hartford feels that the plain and unambiguous language of Section 506(c) is inequitable, it should address its concerns "to the Congress, not the courts." *Dunn v. Commodity Futures Trading Commission*, 519 U.S. 465, 480, 117 S.Ct. 913, 921 (1997).

Furthermore, the various policy and/or equitable considerations that Hartford raises in opposition to a plain meaning construction of Section 506(c) are not well-founded. Hartford thus maintains that trustees often lack sufficient incentive to pursue surcharge recoveries under Section 506(c). *Brief for Petitioner*, p. 6. In making this contention, however, Hartford falsely assumes that any amounts recovered by a trustee under Section 506(c) are earmarked for and paid over in their entirety to the

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the court refused to allow a third party claimant to use the provisions of Bankruptcy Code Section 510(c) to circumvent the fact that Section 506(c) only creates a right of recovery in favor of the trustee).

administrative expense claimant who provided the surcharge claim services. As more fully discussed above, the latter notion not only directly conflicts with the Bankruptcy Code's priority and distribution provisions, it is incompatible with the trustee's role as the representative of the estate.

Indeed, as numerous courts have recognized, it is precisely because the trustee is the representative of the estate—and, as such, owes a fiduciary duty to all creditors—that it is erroneous to suggest that she lacks sufficient incentive to pursue surcharge claims under Section 506(c). *See, e.g., Ford Motor Credit Company v. Reynolds & Reynolds Company (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 485 (4th Cir. 1994). In accordance with her fiduciary duties, the trustee must seek to maximize the value of the estate, which clearly includes pursuing any potential claims under Section 506(c) that might result in a net recovery to the estate. Indeed, if the trustee fails to pursue such a recovery, she could be held personally liable.[13] *Id.*; *Harstad v. First American Bank*, 39 F.3d 898, 903 (8th Cir. 1994) (debtors-in-possession may breach their fiduciary duties if they fail to bring preference actions).

Interestingly, while Hartford repeatedly emphasizes its concerns about the lack of incentive trustees have to pursue surcharge claims under Section 506(c) and points to

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[13] As the court pointed out in *JKJ Chevrolet*, in addition to having a fiduciary obligation, a trustee might also have a personal incentive in insuring that all cost/beneficial recoveries under Bankruptcy Code Section 506(c) are pursued. Specifically, the trustee's own fees and expenses are treated as an administrative expense of the bankruptcy estate and, in recovering such fees and expenses, the trustee must share equally with other administrative expense claimants. Accordingly, if it appears that there may not be sufficient funds to pay all administrative expenses in full, any net recoveries under Section 506(c) will increase the extent to which the trustee recovers her own fees and expenses. *JKJ Chevrolet*, 26 F.3d at 485.

this case as a striking example of that lack of incentive, there is nothing in Hartford's *Application for Allowance of Administrative Expense Pursuant to 11 U.S.C. Section 503 and Charge Against Collateral Pursuant to 11 U.S.C. Section 506(c)* or anywhere else in the record suggesting that Hartford ever requested the Trustee to pursue the recovery of the amounts in question. App. 207a-211a; *see also* Brief for Petitioner, p. 5, n.4. If Hartford truly believed that the Trustee had breached his fiduciary duty by failing to seek the recovery of the premiums currently at issue, it could and should have undertaken appropriate steps to bring the matter to the attention of the Bankruptcy Court. *See JKJ Chevrolet*, 26 F.3d at 485 (suggesting that if a trustee fails to pursue what a creditor believes is a worthwhile surcharge claim under Section 506(c), the creditor could request the bankruptcy court to compel the bankruptcy trustee to pursue the claim or request that the bankruptcy court remove the trustee); *see also Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 274 n.21, 112 S.Ct. 1311, 1321 n.21 (1992) ("it is generally held that a creditor can, by petitioning the bankruptcy court for an order to that effect, compel the trustee to institute suit against a third party."). Instead, Hartford chose to bring its own action under Section 506(c) pursuant to which it hoped to obtain a recovery not to be shared with any other creditors.

Additionally, Hartford argues that if third-party claimants are not afforded a right of recovery under Section 506(c), secured creditors will realize a "windfall." As numerous courts and commentators have observed, however, there are many other means (aside from Section 506(c)) by which administrative claimants can protect their interests. Thus, an unpaid administrative creditor always has the option of ceasing to do business with the debtor if it is concerned that the debtor will ultimately lack sufficient funds to pay it. *See* J. Galton and F. McGovern, *Standing Under Section 506(c) of the Bankruptcy Code Reexamined*, 99 Comm. L.J. 464, 474 (Winter 1994) ("Galton & McGovern") ("It should not be forgotten that the administrative claimant makes a conscious, voluntary credit decision to sell goods or provide services to the estate on an unsecured basis. To attempt thereafter, to use Section 506(c) to improve the claimant's position in effect from unsecured to secured at the expense of the secured creditor (who often is involuntarily involved in the proceeding) does not appear to bear an equitable result.").

A party also can protect against possible nonpayment by insisting upon receiving cash on delivery or cash in advance. Alternatively, if a party's relationship with a bankruptcy debtor necessitates the extension of some type of credit, that party may be able to fully protect its position by obtaining appropriate collateral from the bankruptcy estate in accordance with the provisions of Bankruptcy Code Section 364. 11 U.S.C. § 364(c) and (d) (giving the bankruptcy court authority to approve the granting of a lien—including a "priming lien"—in favor of a postpetition creditor); *see also White Front Feed & Seed, Division of Paul Lammers & Sons, Inc. v. State National Bank of Platteville (In re Ramaker)*, 117 B.R. 959, 967 (Bankr. N.D. Iowa 1990) (dismissing surcharge action filed by administrative claimants after noting "these creditors could have sought a security interest under § 364(c)."). Moreover, if a party engaged in an ongoing transaction or business relationship with a bankruptcy debtor believes that it is being exposed to significant risk of nonpayment, it may seek appropriate relief from the bankruptcy court. *See* 11 U.S.C. § 362(d)(1) (authorizing the bankruptcy court to grant parties relief from the Bankruptcy Code's "automatic stay" provisions if their interests are not being "adequately protected").

Having failed to effectively avail itself of any of the foregoing remedies and confronted by the fact that the Debtor's bankruptcy estate was administratively insolvent, Hartford sought to use Section 506(c) as a federally-created private cause of action pursuant to which it can hold Union Planters liable for the remaining balance of insurance premiums owing to it by the Debtor. As is evident from its plain and unambiguous language, Section 506(c) was never designed to serve such a function. *See, e.g., Loudoun Leasing Development Company v. Ford Motor Company (In re K & L Lakeland, Incorporated)*, 128 F.3d 203, 210 (4th Cir. 1997) (citations omitted) ("§ 506(c) should not be read to provide a means of wealth transfer from secured to unsecured creditors."); *In re Codesco, Inc.*, 18 B.R. 225, 229 (Bankr. S.D.N.Y. 1982) ("There is nothing in Code § 506(c) that creates an independent cause of action in favor of [administrative expense claimants] against the holders of secured claims or their collateral."); P. Lindauer, *Professional Fees and Section 506(c) of the Bankruptcy Code: A Plea for Secured Creditors*, 98 Dick. L. Rev. 401, 411 (1994) ("The statute does not encompass the broad notion that anyone who benefits a secured creditor must be compensated by the secured creditor.").

II. THE LEGISLATIVE HISTORY REINFORCES THE PLAIN MEANING CONSTRUCTION OF SECTION 506(c) AS CREATING A RIGHT OF RECOVERY ONLY IN FAVOR OF THE TRUSTEE AND A CHAPTER 11 DEBTOR IN POSSESSION

A. The Legislative History Refers Exclusively to the Trustee and Debtor in Possession

Because the language of Section 506(c) is clear and unambiguous, it is neither necessary nor appropriate to consider the statute's legislative history. *See, e.g., Patterson v. Shumate*, 504 U.S. 753, 761, 112 S.Ct. 2242,

2248 (1992) (citations omitted) (clarity of statutory language "obviates need for any [] inquiry [into statute's legislative history]."). As the Court stated in *Toibb v. Radloff*, 501 U.S. 157, 164, 111 S.Ct. 2197, 2201 (1991), where the plain language of statute is clear "it makes no difference whether the legislative history affirmatively reflects such an intent." Nonetheless, it is apparent that in the case of Section 506(c), the legislative history only reinforces what is made manifest by the statute's clear and unambiguous terms: the right of recovery under Section 506(c) exists solely in favor of the trustee (or debtor-in-possession) as the representative of the bankruptcy estate.

Thus, the legislative history to Section 506(c) "contains absolutely no reference to allowing a third party to attempt to surcharge a secured creditor's collateral." *Matter of Great Northern Forest Products, Inc.*, 135 B.R. 46, 66 (Bankr. W.D. Mich. 1991). Instead, the legislative history repeatedly refers to the ability of a trustee or debtor-in-possession to seek such relief. Specifically, both the official House and Senate Committee Reports provide that "Subsection (c) also codifies current law by permitting *the trustee* to recover from property [the value of which is] [14] greater than the sums of the claims secured by a lien on that property, the reasonable, necessary costs and expenses of preserving, or disposing of, the property." S. Rep. 989, 95th Cong., 2d Sess. 68, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5854 (emphasis added); H.R. Rep. No. 595, 95th Cong., 1st Sess. 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (emphasis added).

Similarly, during the floor debates in the House and Senate, the trustee and debtor-in-possession were the only

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[14] The Senate Judiciary Committee Report contains the bracketed language whereas the House Judiciary Committee Report contains the phrase "whose value is" in place of the bracketed language.

parties identified as having a right of recovery under Section 506(c):

> Section 506(c) of the House amendment was contained in H.R. 8200 as passed by the House and adopted, verbatim, in the Senate Amendment. Any time *the trustee* or *debtor in possession* expends money to provide for the reasonable and necessary cost and expenses of preserving or disposing of a secured creditors' collateral, *the trustee* or *debtor in possession* is entitled to recover such expenses from the secured party or from the property securing an allowed secured claim held by such party.

124 Cong. Rec. H11089, 11095 (daily ed. Sept. 28, 1978), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6451 (statement of Rep. Edwards) (emphasis added); 124 Cong. Rec. S17406, 17411 (daily ed. October 6, 1978), *reprinted in* 1978 U.S.C.C.A.N. 6505, 6520 (statement of Sen. DeConcini) (emphasis added).

As the above-cited passages make clear, far from supporting a departure from the statute's clear and unambiguous terms, the legislative history to Section 506(c) further confirms Congress' intent that surcharge recoveries be pursued on behalf of the bankruptcy estate rather than on behalf of individual claimants.

B. The Legislative History Does Not Evidence an Unqualified Codification of Pre-Code Practice

Notwithstanding the uniform characterization of Section 506(c) in both the Congressional Committee Reports and in the Congressional floor debates as a remedy existing in favor of the "trustee" and "debtor in possession," Hartford insists that the legislative history to Section 506(c) evidences an intent on the part of Congress to codify all aspects of pre-Code practice which, according to Hartford, included permitting third party claimants to pursue independent surcharge claims. Looking to the

actual text of the legislative history, however, it is apparent that there is no support for this position.

The only pasages of legislative history cited by Hartford which contain any reference to a "codification" of pre-Code practice are those set forth in the House and Senate Judiciary Committee Reports.[13] In neither of these Reports, however, is Section 506(c) described as an unqualified codification of all aspects of pre-Code practice. Instead, the Reports provide that "Subsection (c) . . . codifies current law *by permitting the trustee to recover* from property [the value of which is] greater than the sums of the claims secured by a lien on that property, the reasonable, necessary costs and expenses of preserving, or disposing of, the property." S. Rep. 989, 95th Cong., 2d Sess. 68, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5854 (emphasis added); H.R. Rep. No. 595, 95th Cong., 1st Sess 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (emphasis added).

Thus, far from manifesting a wholesale incorporation of pre-Code practice, the Committee Reports merely: (i) acknowledge the fact that under pre-Code practice, a trustee could recover surcharge claims; and (ii) confirm that this particular aspect of pre-Code practice was being codified in Section 506(c). Neither Report embraces or even acknowledges any other aspects of pre-

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[13] Hartford also refers to the citation of *Textile Banking Company v. Widener*, 265 F.2d 446 (4th Cir. 1959) in the "Table of Derivations"—which was an unofficial table prepared by the staff of the House Judiciary Committee's Subcommittee on Civil and Constitutional Right for the purpose of comparing the House Bill with the Bankruptcy Act then in effect. *See* K. Klee, *Legislative History of the New Bankruptcy Code*, 54 Am. Bankr. L. J. 275, 282 (1980). As Hartford appears to acknowledge, however, the *Widener* case involved a surcharge claim asserted by a trustee and, thus, merely further substantiates that Congress intended Section 506(c) to create a right of recovery in favor of the trustee and not individual claimants.

Code practice. Most significantly, the Reports contain no mention whatsoever of the alleged pre-Code practice whereby third parties were purportedly permitted to recover individual surcharge claims. Thus, for instance, the Reports do not state that "Section (c) codifies current law by permitting the trustee and *third party claimants* to recover . . ." Indeed, as the Reports lack any reference to third party claimants, the only inference that should properly be drawn is that to the extent that Congress was aware of and believed there to be a pre-Code practice whereby third party claimants could bring independent surcharge claims, it did not intend for that practice to be codified in Section 506(c)—a point which, of course, is borne out not only by the clear and unambiguous language of the statute, but also by the legislative history's repeated and exclusive reference to the trustee and the debtor in possession as the proper parties to bring surcharge claims.

III. HARTFORD IMPROPERLY SEEKS TO ELEVATE PRE-CODE PRACTICE ABOVE THE BANKRUPTCY CODE'S CLEAR AND UNAMBIGUOUS LANGUAGE

Hartford further maintains that under the prior holdings of this Court, the practice of surcharging a secured creditor's collateral as it existed under pre-Code law must be recognized and given full effect. In advancing this contention, it is respectfully submitted that Hartford mischaracterizes the previous decisions of the Court.

Indeed, Hartford appears to read the Court's bankruptcy jurisprudence as establishing the following four step procedure for construing and applying federal bankruptcy law: (1) disregard the Bankruptcy Code's plain and unambiguous terms; (2) determine what the practice was prior to the adoption of the Bankruptcy Code; (3) look at the legislative history to the Bankruptcy Code Section involved; and (4) if the legislative history does not contain an affirmative statement expressly disavowing a particular pre-Code practice (or, perhaps, even if it does), the pre-Code practice should be recognized and treated as prevailing law. *See Brief for Petitioner*, pp. 14-20. This Court has never previously adhered to nor condoned such an approach or methodology.

On the contrary, this Court has repeatedly recognized that the Bankruptcy Code was designed to effectuate fundamental and wide-sweeping changes in the bankruptcy laws. *Union Bank v. Wolas*, 502 U.S. 151, 155, 112 S.Ct. 527, 530 (1991) (Pursuant to enactment of Bankruptcy Code in 1978, "Congress overhauled the Nation's bankruptcy laws."); *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, 458 U.S. 50, 53, 102 S.Ct. 2858, 2862 (1982) (plurality opinion) ("The Bankruptcy Act of 1978 made significant changes in both the substantive and procedural law of bankruptcy."). As the Court observed in *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030 (1989) (citations omitted), "Congress worked on the formulation of the [Bankruptcy] Code for nearly a decade. It was intended to modernize the bankruptcy laws, and as a result made significant changes in both the substantive and procedural laws of bankruptcy."

In keeping with its recognition of the extensive efforts undertaken by Congress to reformulate and modernize the bankruptcy laws, this Court has consistently refused to allow pre-Code law and/or practice to override or otherwise alter the Bankruptcy Code's plain meaning. *See, e.g., BFP v. Resolution Trust Corporation*, 511 U.S. 531, 545, 114 S.Ct. 1757, 1765 (1994) ("where the meaning of the Bankruptcy Code's text is itself clear . . . its operation is unimpeded by contrary . . . prior law."); *Wolas*, 502 U.S. at 158-9, 112 S.Ct. at 531-2 (refusing to allow pre-Code law to alter plain and unambiguous terms of Bankruptcy Code Section 547(c)(2)'s "ordinary course

exception"); *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 561, 110 S.Ct. 2126, 2132 (1990) (refusing to allow pre-Code rule excepting criminal restitution obligations from discharge to alter the Bankruptcy Code's plain and unambiguous definition of the term "debt"); *Ron Pair Enterprises*, 489 U.S. at 243-4, 109 S.Ct. 1026, 1031-2 (refusing to allow pre-Code law to alter Bankruptcy Code Section 506(b)'s plain and unambiguous provision for the recovery of post-petition interest by nonconsensual lien holders).

Indeed, to the extent that this Court has looked to pre-Code law as an interpretative aid, it has done so only after finding the relevant provision(s) of the Bankruptcy Code to be ambiguous or silent on the particular question or controversy before the Court. *See, e.g., Dewnsup v. Timm*, 502 U.S. 410, 419, 112 S.Ct. 773, 779 (1992) (considering pre-Code law after determining that the provisions of Bankruptcy Code Section 506(d) are ambiguous on the issue of "lien stripping"); *Kelly v. Robinson*, 479 U.S. 36, 50, 107 S.Ct. 353, 361 (1986) (considering pre-Code law after determining that provisions of Bankruptcy Code Section 523(a)(7) are "subject to interpretation.").

Of course, in the matter at hand, the relevant statutory provision is neither silent nor ambiguous but, instead, explicitly and unmistakably provides that it is the trustee, as representative of the estate, who is to pursue surcharge recoveries under Section 506(c). Thus, consideration of pre-Code law and practice is neither necessary nor appropriate. *Cf. Ron Pair Enterprises*, 489 U.S. at 241, 109 S.Ct. at 1029 ("The language before us expresses Congress' intent . . . with sufficient precision so that reference to legislative history and to pre-Code practice is hardly necessary.").

Moreover, it is important to recognize that even in those rare instances in which the Bankruptcy Code has been found ambiguous or silent and, thus, it has been appropriate to consider pre-Code practice, the Court has been reluctant to be guided by pre-Code practice unless it embodies a thoroughly tested and firmly established rule of law. Thus, for instance, in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 504, 106 S.Ct. 755, 760 (1986), the Court concluded that it was appropriate to recognize certain pre-Code exceptions to the trustee's abandonment power only after noting that under pre-Code practice, "the exceptions to the judicially created abandonment power were firmly established." *See also Kelly*, 479 U.S. at 46, 107 S.Ct. at 359 (giving weight to pre-Code rule of excepting criminal restitution obligations from discharge after observing that the pre-Code rule was "widely accepted" and "established").

On the other hand, in those circumstances in which the pre-Code practice did not evidence a well-established and firmly entrenched rule, the Court has rejected it as a meaningful interpretative aid. Thus, for example, in *Ron Pair Enterprises*, 489 U.S. at 246, 109 S.Ct. at 1033, the Court—after noting that pre-Code practice was irrelevant because the statute was clear and unambiguous—went on to note that even if pre-Code practice were considered, it could not be given any weight because it "was recognized by only a few courts and often dependent on particular circumstances." Accordingly, the Court concluded that "it was not the type of 'rule' that we assume Congress was aware of when enacting the Code; nor was it of such significance that Congress would have taken steps other than enacting statutory language to the contrary." *Id.*; *see also Bank of America National Trust and Savings Association v. 203 North LaSalle Street Partnership*, 119 S.Ct. 1411, 1425 (Thomas, J., concurring)

(rejecting relevance of pre-Code acceptance of "new value exception" on grounds that the exception had only been recognized by the Court in *dicta*).

In the instant case, it is evident that to the extent that third-party claimants were allowed to pursue individual surcharge recoveries under pre-Code practice, they did not do so pursuant to a thoroughly tested and well-established rule of law. Indeed, few, if any, aspects of pre-Code surcharge practice were "well-established." As one commentator at the time observed, "hardly any phase of the bankruptcy law has been plagued with so many inconsistent generalities, irreconcilable rules and principles, disagreements between circuits and even within circuits (apparently without any awareness thereof) and loose, indiscriminate statement of rules and citations of authority." 4B *Collier on Bankruptcy*, ¶ 70 at 1224 (14th Ed. 1978).

Nonetheless, it is clear that "[i]n most [pre-Code] cases, the trustee or receiver petitioned the court directly to recover costs from the lienor's interest." J. Toth, *Rehabilitating Bankruptcy Code Section 506(c): Should Third Party Claimants Have Independent Standing?*, 16 W. New. Eng. L. Rev. 1, 11 (1994). Indeed, this point appears to be substantiated by the only pre-Code case cited in the legislative history to Section 506(c)—*Textile Banking Company v. Widener*, 265 F.2d 446 (4th Cir. 1959)—wherein it was the trustee (and not a third party claimant) who sought and obtained the surcharge recovery.

Moreover, as Hartford readily acknowledges, on those occasions in which third party claimants were permitted to obtain surcharge recoveries, the focus was not on whether such claimants were the proper parties to obtain such recoveries but, rather, "on the equitable grounds for allowing the charge against the collateral." *Brief for Petitioner*, p. 25, n.18. Thus, the question of whether third party claimants were the appropriate parties to obtain

such recoveries was not one that was ever vigorously or thoroughly tested.

Under these circumstances, it appears that even if it were appropriate to consider pre-Code practice (which, for the reasons set forth above, it is not), the pre-Code practice pertaining to the recovery of surcharge claims would not serve as a meaningful interpretative aid. *See* Toth, at 12 (pre-Code practice "offers little guidance in evaluating the merits of granting, or denying, third party standing to section 506(c) claimants."). Specifically, to the extent that pre-Code practice allowed for the recovery of surcharge claims by individual claimants, it hardly constituted "the type of 'rule' that we assume Congress was aware of when enacting the Code; nor was it of such significance that Congress would have taken steps other than enacting statutory language to the contrary." *Ron Pair Enterprises*, 489 U.S. at 246, 109 S.Ct. at 1033.

Also, it must be remembered that the pre-Code law and practice pertaining to surcharge recoveries and secured claims in general developed under a fundamentally different legal framework—a framework that lacked much of the sophistication, detail and intricacy of the modern Bankruptcy Code. *See, e.g.*, H.R. Rep. No. 595, 95th Cong., 1st Sess. 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5965 (wherein the House Judiciary Committee, in advocating the adoption of Bankruptcy Code, described pre-Code bankruptcy law as a system that was designed in "the horse and buggy era of consumer and commercial finance" and that had not been "overhauled . . . in nearly 40 years").

Indeed, as this Court previously has acknowledged, the Bankruptcy Code was designed to modernize bankruptcy law by replacing many of the indefinite and outdated principles and practices that existed under earlier bankruptcy law with a more comprehensive and structured

system. This was especially true with respect to the treatment of secured claims. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026 (*quoting* legislative history) ("In particular, Congress intended 'significant changes from current law in . . . the treatment of secured creditors and secured claims.' "). Thus, it is apparent that many of the broad and amorphous pre-Code concepts upon which Hartford seeks to rely have limited relevance to and provide little insight into the structure and operation of the Bankruptcy Code. *Cf. 203 North LaSalle Street Partnership*, 119 S.Ct. 1411, 1425 (Thomas J., concurring) ("The Code's overall scheme often reflects substantial departures from various pre-Code practices . . . Hence it makes little sense to graft onto the Code concepts that were developed during a quite different era of bankruptcy practice.").

IV. HARTFORD'S CONTENTION THAT THE DECISION BELOW VIOLATES ESTABLISHED PRINCIPLES OF STANDING IS BASED UPON A FUNDAMENTAL MISUNDERSTANDING OF THE RELEVANCE OF SUCH PRINCIPLES TO THE QUESTION PRESENTLY BEFORE THE COURT

Hartford further insists it is entitled to pursue a private right of recovery under Section 506(c) based upon the established principles of "standing" as recognized and articulated by this Court. While it is true that many courts and commentators have conveniently used the word "standing" when describing the issue of whether third party claimants such as Hartford may surcharge a secured creditor's collateral under Section 506(c), this characterization can be misleading and, ultimately, is technically inaccurate. The issue currently before the Court is not one of standing (in the traditional sense) but rather whether Congress intended for Section 506(c) to provide third party claimants such as Hartford with a right of recovery against secured creditors and/or their

collateral. Thus Hartford is mistaken in attempting to find support for its position in the jurisprudence addressing traditional notions of standing.

As this Court repeatedly has recognized, there is a profound and fundamental distinction between the concepts of standing and whether a party has a right of recovery or remedy under a particular federal statute. *See, e.g., Steel Company v. Citizens For A Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 1010 (1998) (courts must resolve questions of standing before considering whether plaintiff has a cause of action); *Davis v. Passman*, 442 U.S. 228, 239, n.18, 99 S.Ct. 2264, 2274, n.18 (1979) (distinguishing concepts of "jurisdiction," "standing," "cause of action," and "relief."). Specifically, standing concerns whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731, 92 S.Ct. 1361, 1364 (1972). Thus, the law of standing requires that a party bringing an action have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 804, 105 S.Ct. 2965, 2965, 2970 (1985).

In contrast, the question of whether a party has a right of recovery or remedy under a particular federal statute is one of statutory construction pursuant to which the court must determine whether Congress intended to create a remedy in favor of a particular litigant. As this Court stated in *Karahalios v. National Federation of Federal Employees, Local 1263*, 489 U.S. 527, 532, 109 S.Ct. 1282, 1286 (1989) (citations omitted), the question of whether a party has a private cause of action under a statute "poses an issue of statutory construction . . . Unless such congressional intent can be inferred from

the language of the statute, the statutory structure, or some other source, the essential implication of a private remedy simply does not exist." Thus, "the focus of cause of action inquiry must not be confused with standing—it does not go to the quality or extent of the plaintiff's injury, but to the nature of the right asserted." 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 3531.6 at 500 (1984).

Traditional questions of standing most commonly arise in connection with "challenges to government conduct, where the litigants often lack the obvious stake normally present in most lawsuits between private parties[.]" L. Tribe, *American Constitutional Law*, § 3-14 at 104 (2nd Ed. 1988). As one noted scholar observed, "[t]he law of standing is almost exclusively concerned with such public-law questions as determinations of constitutionality and review of administrative or other governmental action." C. Wright, *Law of Federal Courts*, § 13 at 68 (5th Ed. 1994). Thus, in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197 (1975), a case heavily relied upon by Hartford in its attack on the *en banc* Circuit decision below, the Court considered whether a citizens group and certain residents of Rochester, New York, had standing to challenge a neighboring town's zoning ordinances under the "privileges and immunities" clause. *See also Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154 (1997) (another case relied upon by Hartford, wherein the Court considered whether a group of ranchers and irrigation districts had standing to challenge certain actions taken by the U.S. Secretary of the Interior and certain members of the Federal Fish and Wildlife Service); *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315 (1984) (wherein the Court considered whether the parents of African-American children attending public school had standing to challenge the Internal Revenue Service's alleged failure to adopt sufficient procedures to deny tax-exempt status to racially discriminatory private schools); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827 (1970) (wherein the Court addressed the issue of whether certain data processing companies had standing to challenge certain rulings by the Comptroller of Currency).[16]

On the other hand, when an action is between private parties and—like the present case—essentially involves a demand for monetary relief, the question of standing is rarely at issue. There normally is no question that the plaintiff would have a sufficient stake in the outcome of the action to insure that a justiciable controversy is properly presented to the court. *See* 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 3531.6 at 496 (1984) ("Ordinarily there is no question as to the standing of a plaintiff who claims a personal right to a damages remedy.").

In the case at bar, the issue before the Court is not whether Hartford has standing to pursue a private right of recovery under Section 506(c).[17] Instead, the issue in this case is whether Hartford has a private right of recovery

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[16] In its "standing" argument, Hartford also cites to *Meyer v. Fleming*, 327 U.S. 161, 66 S.Ct. 382 (1946), a case in which the Court held that the principal of a corporation could continue to assert a derivative claim on behalf of the corporation notwithstanding the corporation's bankruptcy filing. Aside from having no factual similarity to the instant matter, it is clear that this case does not address (even by way of analogy) the central question of when a party can pursue a right of recovery expresssly created in favor of another party.

[17] Traditional notions of standing might be implicated if Hartford were proposing to pursue a surcharge recovery on behalf of the bankruptcy estate, for in such circumstances there might be some question as to whether Hartford's interest as a pro-rata beneficiary of any amounts recovered would constitute a sufficient "stake in the outcome" to insure that Hartford would vigorously pursue the claim. From the inception of this matter, however, Hartford has made clear that it seeks to surcharge Union Planter's collateral solely and exclusively for its own benefit.

under Section 506(c), that is, notwithstanding the fact that by its express terms, the statute only creates a remedy in favor of the trustee as the representative of the bankruptcy estate.

In concluding that Hartford does not have such a right of recovery, the court below reached a result that is in complete harmony with the plain meaning of the statute and the prevailing precedents of this Court. *See, e.g., National Association of Railroad Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693 (1974) ("when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies . . .").

CONCLUSION

For all the above stated reasons, Respondent Union Planters Bank, N.A. respectfully submits that the decision of the Eighth Circuit Court of Appeals, en banc, should be affirmed.

Respectfully submitted,

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No. 99-409

IN THE

Supreme Court of the United States

HARTFORD UNDERWRITERS INSURANCE COMPANY,

Petitioner,

v.

UNION PLANTERS BANK, N.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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I. THIS CASE INVOLVES THE PROPER DISTRIBUTION OF PROPERTY OF THE DEBTOR'S BANKRUPTCY ESTATE, AND THE DEBTOR'S ESTATE SHOULD BE DISTRIBUTED IN ACCORDANCE WITH THE PRIORITIES SET BY THE GOVERNING STATUTORY SCHEME.

Magna disputes that Hartford may obtain relief under section 506(c) on the theory that Hartford seeks to pursue a private cause of action that Congress has not authorized against Magna and its property. Specifically, Magna frames the issue as "whether Congress intended for Section 506(c) to provide third party claimants such as Hartford with a right of recovery against secured creditors and/or their collateral," and defines the present controversy as "a demand for monetary relief" arising "between private parties." (Magna's Brief at 46-47, 49). But this matter does not involve an implied private controversy between a claimant and a secured party over the secured party's property. On the contrary, it involves the proper distribution of encumbered property belonging to a bankruptcy estate, and likewise concerns persons who are already parties in interest in the relevant bankruptcy proceedings, and are already subject to the requirements of the governing Bankruptcy Code regarding the treatment of their respective claims.

As Justice Frankfurter explained in his concurrence in *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 170 (1946), "[p]utting the wrong questions is not likely to beget right answers even in law." Moreover, invoking "the classic admonition to begin at the beginning," he observed succinctly that "[t]he business of bankruptcy administration is to determine how existing debts should be satisfied out of the bankrupt's estate so as to deal fairly with the various creditors." *Id.* at 169. In this instance, Magna mischaracterizes the nature of the proceedings in an effort to obscure the relevant analysis. In truth, this matter involves nothing more than a priority dispute over the distribution of property of the estate as to which section 506(c) directs that Magna ought not to prevail.

As explained in Hartford's initial brief, bankruptcy proceedings are fundamentally *in rem* in nature, and in the context of an *in rem* insolvency proceeding, parties such as Hartford have a recognized stake in ensuring the enforcement of the governing statutory scheme because they hold a tangible financial interest, and because "everyone with a claim to the *res* has a right to be heard before the *res* is disposed of since that disposition will extinguish all such claims." *In re James Wilson Assocs.*, 965 F.2d 160, 169 (7th Cir. 1992); (*see* Hartford's Brief at 32-34). In some instances, of course, the trustee is authorized to ensure the fulfillment of the relevant statutory scheme. In this instance, however, Magna seeks to exploit the trustee's inability and lack of incentive to enforce compliance with section 506(c) as a basis to secure for itself the very windfall that the section seeks to prevent. In other words, Magna champions a result demonstrably at odds with Congress's intent in enacting section 506(c). (*See* Hartford's Brief at 11-14) (discussing the purpose of section 506(c)). As this Court has indicated, it will not construe the provisions of the Bankruptcy Code to achieve such a result. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (observing that a statute is not to be construed in a manner that "will produce a result demonstrably at odds with the intention of its drafters"). Similarly, as this Court stated unanimously in rejecting a construction of the Bankruptcy Code in the setoff context that would have eviscerated the relevant statutory purpose, "it is an elementary rule of construction that 'the act cannot be held to destroy itself.' " *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20 (1995) (quoting *Texas & Pac. Ry. Co. v. Abiline Cotton Oil Co.*, 204 U.S. 426, 446 (1907)). In this case, the destruction of section 506(c) is precisely what Magna has in mind, but Magna ought not to prevail.

To demonstrate in sharper detail why Magna ought not to prevail, it is helpful to illustrate the two ways in which a claim under section 506(c) may arise. Doing so reveals not only the errors in Magna's argument, but also more clearly why it is that

claimants such as Hartford are entitled to pursue recovery under section 506(c).

To begin with, suppose that a bankruptcy estate owns a parcel of land encumbered by a lien in favor of a secured party. Suppose further that the land is contaminated with toxic waste that reduces the value of the land. The trustee may contract with a third party to have the waste removed, and may then pay the cost from unencumbered funds of the estate. Later on, the trustee may also sell the land. *See* 11 U.S.C. § 363. To the extent the trustee's clean-up activities have increased the value of the land (thereby bestowing a direct benefit on the secured party by increasing the value of its collateral), the trustee may commence a proceeding to recover the clean-up costs from the proceeds of the sale under section 506(c) to replenish the estate for the amount the trustee has paid.

Suppose, however, that after the contractor completes the remediation, the trustee informs him or her that there are no unencumbered funds in the estate to pay the contractor's bill. Suppose further that the secured party refuses to consent to the use of its collateral (i.e., the land or its proceeds) to pay the bill, and the trustee also has no funds to litigate the issue with the secured party. Under Magna's theory, the contractor is simply out of luck, and the bank walks away with the full proceeds of the sale enhanced by the contractor's clean-up services–a result demonstrably at odds with the purpose of section 506(c), which is precisely to prevent the secured party from receiving such a windfall. (*See* Hartford's Brief at 12-13).

Similarly, suppose that the party performing the remediation is a state or federal agency. Under Magna's approach, the agency would have no right to recover its remediation costs from a secured party's collateral if the trustee lacks the ability or incentive to pursue payment of the agency's claim on the agency's behalf. Thus, under Magna's theory, those cases holding to the contrary are simply incorrect, and should be overruled. *See Guterl Special Steel Corp. v. Economic Dev. Admin. (In re Guterl Special Steel Corp.)*, 198 B.R. 128, 136-

37 (Bankr. W.D. Pa. 1996) (EPA entitled under section 506(c) to recover its cleanup costs from encumbered property before payment of secured claims); *In re T.P. Long Chem., Inc.*, 45 B.R. 278, 287 (Bankr. N.D. Ohio 1985) (EPA permitted under section 506(c) to seek recovery of its cleanup expenses from secured creditor's funds to same extent as trustee). But Magna offers no explanation why governmental agencies (and therefore the public) should subsidize the recoveries of secured creditors in bankruptcy proceedings.

As the foregoing illustrates, when a trustee pays an administrative claim from unencumbered funds of a bankruptcy estate, the claimant receives payment of its claim, and the trustee may then recover the amount paid from the secured creditor's collateral to the extent of the benefit to the secured party. *See* 11 U.S.C. § 506(c). On the other hand, in cases such as this one in which the trustee has no ability to pay the claim, and no ability or incentive to litigate with the secured party, two outcomes are possible: (i) the secured party may enjoy the benefit of a windfall by obtaining for free the value of the services provided by the administrative claimant; or (ii) the administrative claimant may enforce the priority of its claim under section 506(c). For over a century, the rule has been that the unpaid administrative claimant is entitled to pursue recovery of its claim on its own account. *See Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501, 506 (1891); (Hartford's Brief at 13-14, 21-26); *see also Burnham v. Bowen*, 111 U.S. 776 (1884); John W. Smith, *The Law of Receiverships* 574-75 (1897). Because this rule is necessary to vindicate the purpose of section 506(c) in cases of this kind, the Court should adhere to its prior precedent and conclude that Hartford is entitled to pursue its claim under the statute in this proceeding.[1]

1. Moreover, because the rule is necessary to vindicate the purpose of section 506(c), it is likewise enforceable under 11 U.S.C. § 105. Section 105 provides in relevant part: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Although section 105 is (Cont'd)

Magna argues in opposition that it should be able to obtain its windfall on the theory that parties dealing with bankrupt debtors should either take steps to ensure payment (e.g., by taking a lien, or insisting on C.O.D.), or proceed entirely at their own peril. (*See* Magna's Brief at 35). But apart from the impact that this would have on the estate's ability to obtain credit, and likewise apart from the fact that the very purpose of section 506(c) is to provide a source of payment for "the reasonable, necessary costs and expenses of preserving, or disposing of" property encumbered by a lien, Magna's theory is otherwise unworkable. Bankruptcy estates frequently incur debts to creditors who have no choice but to deal with the debtor. For example, debtors that continue to operate their businesses in bankruptcy frequently incur tax obligations, and may likewise incur environmental liabilities at their facilities. In *United States, Internal Revenue Service v. Boatmen's First National Bank*, 5 F.3d 1157 (8th Cir. 1993), the Court of Appeals recognized the right of the United States to recover under section 506(c) certain administrative taxes incurred during the course of the debtor's failed attempt to reorganize. Under Magna's approach, the United States would have no authority to enforce the requirements of section 506(c).[2] But, again, Magna supplies no reason why involuntary administrative claimants (such as the United States) should incur losses for the benefit of secured parties in the bankruptcy setting.

In this case, Hartford is also an involuntary creditor. Because the Debtor was not creditworthy, the Debtor obtained its workers' compensation insurance from Hartford through an assigned risk pool arrangement. Having tendered its application for insurance, together with a portion of the premium, Hartford

(Cont'd)
not available to prescribe relief in conflict with other provisions of the Bankruptcy Code, it is available to ensure compliance with the Code's requirements. Because that is all that Hartford seeks, section 105 provides further support for Hartford's right of recovery in this case.

2. The court below agreed, and expressly overturned *Boatmen's* in its *en banc* decision. (*See* App. 300a, 308a).

was obliged to accept the Debtor as an insured as a condition of the privilege of writing insurance in the Debtor's state of operations. It is undisputed that Hartford's provision of workers' compensation insurance allowed the Debtor to continue to operate, thereby enabling the Debtor to sell certain of its business operations as going concerns, rather than on the auction block. (*See* App. 216a-217a). It is also undisputed that this enabled the Debtor to maximize the value of its operations, which provided a benefit to Magna by enhancing the value of its collateral. (*See* App. 217a, 163a). Magna argues that it is simply too bad that the Debtor did not pay for this insurance in full, even though Magna agreed originally that the cost should be paid from its collateral, and the bankruptcy court directed the Debtor to pay Hartford's claim. (*See* App. 145a, 178a; Hartford's Brief at 3-4). But there is no reason why Magna should enjoy the benefits of the reorganization process without provision for the payment from its collateral of the costs of preserving and disposing of its collateral. Indeed, section 506(c) directs that Magna's collateral must bear these expenses, and Hartford is entitled to vindicate the statutory purpose where, as here, its claim has not been paid.

II. SECTION 506(c) DOES NOT PLAINLY DISPOSE OF THE ISSUE PRESENTED IN THIS CASE.

Magna argues that the language of section 506(c) is "plain and unambiguous" in establishing that only a trustee (or debtor in possession) may enforce the relief that the section recognizes. (*See* Magna's Brief at 10). But section 506(c) does not state that "only" a trustee may enforce its terms, nor does it expressly preclude parties such as Hartford from doing so. (*See* Hartford's Brief at 30) (listing sections from the Bankruptcy Code that delimit persons with certain rights). In truth, Magna's interpretation of section 506(c) does not rest on any "plain" directive in the text, but rather on the *inference* that Congress's use of the term "trustee" was intended to: (i) overrule such cases as *Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501 (1891); (ii) overturn a century of prior practice; and (iii)

condone a windfall to the secured creditor by permitting it to enjoy the benefits of services supplied by others that enhance or preserve the value of its collateral without provision for the payment of these services from the collateral. Apart from the implausibility of Magna's interpretation, the mere fact that Magna's "plain meaning" argument turns on an *inference* is sufficient to demonstrate that the meaning of section 506(c) is far from "plain" on the issue in this case. In truth, the instant controversy requires a more comprehensive analysis, not one that ignores the context, history, logic, structure, and purpose of the relevant law, or the larger statutory scheme of which the provision at issue is but a component part. *Cf. BFP v. Resolution Trust Corp.*, 511 U.S. 531, 546-47 (1994) (finding the term "reasonably equivalent value" used in section 548(a)(2) of the Bankruptcy Code to be ambiguous because it did not answer the critical question at issue, thus necessitating a broader inquiry); *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 500-05 (1986) (concluding that section 554 should be interpreted in light of prior practice and applicable state law concerns designed to protect the public health and safety).

Magna argues in opposition that reference to the history of section 506(c), particularly the pre-Code practice preceding its enactment, is immaterial because the language of the section is clear. (*See* Magna's Brief at 40). But as Justices Scalia and Thomas noted in their recent concurrence in *Bank of America National Trust & Savings Ass'n v. 203 North LaSalle Street Partnership*, 119 S. Ct. 1411 (1999), reference to pre-Code practice is appropriate where, as here, the text of the relevant statute does not resolve expressly the issue before the Court. *See id.* at 1425. Illustrating their point, the concurring Justices in *LaSalle* cited to the Court's analysis in *Midlantic*, which involved the question of whether a trustee's ability to abandon contaminated property under section 554 of the Bankruptcy Code included restrictions not specified in the statutory text. *See LaSalle*, 119 S. Ct. at 1425; *Midlantic*, 474 U.S. at 501.

Just as the text of section 554 does not by itself resolve the issue decided in *Midlantic*, the text of section 506(c) likewise does not direct expressly that parties in interest such as Hartford have no ability to enforce compliance with the section's requirements.

Moreover, reference to pre-Code practice is even more compelling in this case than in *Midlantic*. In *Midlantic*, the Court discerned the relevant pre-Code practice from two court of appeals decisions and a bankruptcy court decision. *Midlantic*, 474 U.S. at 500-01. In this case, the relevant pre-Code practice traces its origins directly to decisions by this Court, most prominently *Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501 (1891), and numerous court of appeals decisions under the prior Bankruptcy Acts of 1867 and 1898. (*See* Hartford's Brief at 20-23); *see also Burnham v. Bowen*, 111 U.S. 776 (1884); John W. Smith, *The Law of Receiverships* 574-75 (1897). Magna counters that pre-Code practice on the issues addressed in section 506(c) was equivocal, and therefore unpersuasive. (*See* Magna's Brief at 44). This argument, however, is also without merit. Although it may be true that *some* aspects of the pre-Code practice preceding the enactment of section 506(c) were equivocal (e.g., regarding the precise kinds of costs that could be paid from a secured party's collateral), there was no ambiguity on the question of *who* could petition the court for payment of an administrative claim from property encumbered by a secured party's lien. (*See* Hartford's Brief at 23-24, 25 n.18).

Similarly, Magna and its *amicus* argue that Hartford's cases do not demonstrate an established rule of law. (*See* Magna's Brief at 43; Amicus Brief of Commercial Finance Association at 16 n.9). But as Judge Calabresi has explained, there is no better evidence of the existence of a right than its repeated recognition and vindication by the courts, particularly this Court. *See Aetna Cas. & Sur. Co. v. LTV Steel Co. (In re Chateaugay Corp.)*, 94 F.3d 772, 778 (2d Cir. 1996) ("[T]here is no better proof of the existence of a common law right that its exercise, and acceptance by the courts."). In this instance, the evidence

of the relevant pre-Code practice is both more established and more compelling than the evidence in *Midlantic*. Accordingly, as in *Midlantic*, the relevant pre-Code practice should be followed.

In further opposition, Magna argues that the Court should disregard its own precedents under the prior law, as well as those of the lower courts, because, in enacting the provisions of the Bankruptcy Code, Congress intended a general overhaul. (*See* Magna's Brief at 41). This argument, however, is also misplaced. It is certainly true that, in enacting the provisions of the Code, Congress altered expressly some features of the prior legal landscape. (*See* Hartford's Brief at 18-19 n.12). But as explained in the reports of both the House Judiciary Committee and the Senate Judiciary Committee, Congress intended section 506(c) to "codif[y] the current law," not embrace a wholesale revision. H.R. Rep. No. 95-595, at 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313; S. Rep. No. 95-989, at 68 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5854.

Moreover, as in *Midlantic*, there is simply no evidence that Congress intended to change the relevant practice predating the enactment of section 506(c). Significantly, just as the legislative history to section 554 is entirely silent on the issue addressed by the Court in *Midlantic*, the legislative history to section 506(c) is likewise silent on the issue of the ability of an administrative claimant to recover certain costs from property encumbered by a lien. *See* H.R. Rep. No. 95-595, at 377 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6333 (discussing section 554); S. Rep. No. 95-989, at 92 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5878 (same); 124 Cong. Rec. 32,401 (1978) (same); 124 Cong. Rec. 34,000 (1978) (same). Magna argues that Congress's silence is tantamount to rejection of the prior practice. But this Court has embraced precisely the opposite approach. In *Midlantic* the Court observed that "[i]n codifying the judicially developed rule of abandonment [codified in section 554], Congress also presumably included the established corollary that a trustee could not exercise his abandonment power in

violation of certain state and federal laws." 474 U.S. at 501. Similarly, in codifying the judicially developed rule of equitable surcharge in section 506(c), Congress also presumptively included the established corollary that an individual claimant could recover its unpaid claim directly. Accordingly, Magna's argument is without merit.

III. ANY RECOVERY UNDER SECTION 506(c) IN THIS CASE BELONGS TO HARTFORD.

Magna argues next that Hartford cannot pursue payment of its claim under section 506(c) because any recovery under section 506(c) must be distributed through the bankruptcy estate in accordance with the Code's hierarchical distribution scheme, and that only a trustee may pursue claims of this kind on behalf of an estate. (*See* Magna's Brief at 20-23). Of course, what Magna really means is that, any recovery under section 506(c) must revert back to Magna. As explained in Hartford's initial brief, Magna holds a lien on all property of the estate, and is therefore perched at the top of the distributional hierarchy. (*See* Hartford's Brief at 3, 5). But what Magna does not explain is why the value of the priority of one party's claim should be distributed in this context to others whose claims have no similar right of payment. In addition, Magna fails to explain why, in situations in which the trustee actually *pays* an administrative claim, and then seeks reimbursement from a secured party's collateral under section 506(c), the claimant is not required to share its recovery, but in situations in which the trustee does *not* pay the claim, the unpaid administrative claimant must share the priority with others whose claims are not entitled to be paid from the secured party's collateral.

In situations in which a trustee actually pays an administrative claim from unencumbered funds of the estate, the administrative claimant receives payment from funds that would otherwise go to pay other unsecured creditors. Hence, when the trustee seeks recovery under section 506(c) for the amount the trustee has paid to the administrative claimant, the trustee seeks merely to take funds that would otherwise go to

satisfy the secured party's claim and reallocate them to the general fund to reimburse the general fund for sums that the secured party's collateral rightfully should bear. In contrast, in situations in which the trustee does *not* pay an administrative claim from unencumbered funds of the estate, the matter is entirely different because the trustee has not made use of unencumbered funds that would otherwise go to pay unsecured creditors. Accordingly, there is no reason why any recovery that the administrative claimant may obtain under section 506(c) should be shared with other unsecured creditors whose own claims do not represent expenses incurred to preserve or enhance property encumbered by the secured party's lien. *Cf. Burnham v. Bowen*, 111 U.S. at 783 (concluding that secured party's collateral should be used to pay claim of party who supplied goods that preserved value of railroad, but should not be "used to pay the general creditors of the road").

An administrative claimant who provides services to a bankruptcy estate is entitled to the payment of its claim. *See* 11 U.S.C. §§ 503 & 507. If the services provide a benefit to a secured party in the preservation or disposition of its collateral, the claim is to be paid from the secured party's collateral on a priority basis from that collateral. *See* 11 U.S.C. § 506(c). Section 506(c) thus defines a special payment entitlement for a discrete category of administrative claims (i.e., those that provide a benefit to the secured party by preserving or enhancing the value of the relevant collateral). In other words, section 506(c) is a priority provision that defines how certain property of the estate (i.e., property encumbered by a lien) shall be used to pay certain specific administrative claims, including Hartford's claim in this case.

Magna argues in opposition that section 506(c) does not define any special type of priority. But the case law recognizes

the section as a priority provision. *See United States v. FDIC*, 899 F. Supp. 50, 55-56 (D.R.I. 1995) ("The priority for payment of claims is that § 506(c) expenses or operating expenses that benefitted the creditor are paid first out of the proceeds of the sale, before a secured creditor is paid. Then after all § 506(c) expenses and secured claims are satisfied, the priority of remaining claims is established by § 507." (citations omitted)); *In re Ascher*, 146 B.R. 764, 771 (Bankr. N.D. Ill. 1992) ("With a super priority claim under § 506(c), Movants are entitled to payment of this claim ahead of any other claimant including the Trustee, and this claim may be recovered directly from the property." (citation omitted)); *In re Mechanical Maintenance, Inc.*, 128 B.R. 382, 389 (E.D. Pa. 1991) ("[S]ection 506(c) costs of preserving or disposing of collateral have a unique superpriority under the Bankruptcy Code.").

Magna and its *amicus* argue further that section 506(c) cannot be a priority provision because it is not referenced in sections 507(a) or 726(b), which prescribe the priority of certain claims. (*See* Magna's Brief at 26-28; Amicus Brief of Commercial Finance Association at 18-19). But Magna's own priority as a secured party is also not mentioned in sections 507 or 726. Yet it does not follow that Magna's priority therefore does not exist.

As courts have noted, section 507 governs the priority of payment among certain unsecured claims, and makes no reference to secured claims because secured claims are entitled to payment from the assets that they encumber. *See United States v. Victor*, 121 F.3d 1383, 1389 (10th Cir. 1997) ("It is unnecessary to extend that special status [of section 507 priority claims] to secured claims because those claims are entitled to repayment from an alternative source of funds — the value of the property encumbered by a lien."). Surely Magna would balk at the suggestion that *its* priority as a secured party should be shared with general unsecured creditors simply because doing so would further the policy of equality of distribution. Properly understood, the policy of equality of distribution applies only

within classes of claims with the same legal rights. *See In re Smith*, 966 F.2d 1527, 1535 (7th Cir. 1992) (noting the " 'prime bankruptcy policy of equality of distribution among creditors' by ensuring that all creditors of the same class will receive the same pro rata share of the debtor's estate" (quoting H. R. Rep. No. 95-595, at 177-78 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6137-39)). Because claimants with payment rights arising through application of section 506(c) occupy their own defined class, they need not share their recoveries with others who have no similar rights under the section.

In addition, Magna argues that Hartford cannot pursue its claim in this case because doing so would invert the provisions of section 726(b). (*See* Magna's Brief at 22-23). Section 726(b) provides that, in a chapter 7 case, payment of chapter 7 administrative expenses takes priority over unpaid chapter 11 administrative claims. But reference to this provision does not defeat Hartford's claim. In fact, it bolsters it.

As explained above, Hartford's administrative claim bears an attribute that general administrative claims do not bear: it is entitled to payment from Magna's collateral. Hence, regardless of whether the case is a proceeding in chapter 11 or 7, Hartford's claim is still payable out of Magna's collateral. Because Hartford's claim arose during the course of the Debtor's chapter 11 case, Magna suggests that any recovery on account of Hartford's claim should be used first to pay chapter 7 administrative expenses. Not only is this result not directed by section 726(b), it would also create a perverse incentive to exploit the conversion of a case in a way that would undermine the limitations of section 506(c).

Under Magna's approach, a chapter 7 trustee could incur substantial expenses challenging the lien of a secured creditor following the conversion of the case from a chapter 11 proceeding to a proceeding under chapter 7. Ordinarily, administrative expenses incurred in challenging a secured party's lien are not recoverable under section 506(c) because they do not confer any direct "benefit" on the secured party.

See General Elec. Credit Corp. v. Levin & Weintraub (In re Flagstaff Foodservice Corp.), 739 F.2d 73, 76 (2d Cir. 1984). Nevertheless, so long as there existed an unpaid administrative claim from the chapter 11 proceeding that was entitled to be paid from the secured party's collateral, the chapter 7 trustee could incur significant fees and expenses challenging the secured party's lien, and then obtain payment of his or her fees and expenses as an administrative expense from the secured party's collateral by using the funds recovered on account of the chapter 11 administrative claim to pay them. But there is no reason why a trustee should be entitled to use one party's priority to secure a result at odds with the limitations of the governing statutory scheme. Magna's argument is thus unsound, and the Court should conclude that Hartford is entitled to pursue the priority of its own claim in this proceeding.

IV. THE BANKRUPTCY CODE ALTERS MAGNA'S RIGHTS IN THIS INSTANCE.

In further opposition to Hartford's claim, Magna's *amicus* argues that Hartford should not be entitled to enforce the provisions of section 506(c) because of the general principle that "liens pass through the bankruptcy case unaffected." (*See* Amicus Brief of Commercial Finance Association at 12). Of course, Magna's *amicus* acknowledges that various provisions of the Bankruptcy Code do, in fact, adjust a secured creditor's lien rights. Specifically, it acknowledges that section 506(c) is an example of such an adjustment. Nevertheless, it argues that section 506(c) must be construed narrowly in order to preserve for the secured party the benefit of the concept that its lien should not be touched. But after reviewing the litany of lien modification provisions that Magna's *amicus* recites, one is left with the accurate impression that the concept that "liens pass through bankruptcy" is more myth than reality under the current Bankruptcy Code. And of all the provisions cited, none is more telling on this point than section 552.

Section 552(a) states the general bankruptcy rule that a secured party's lien will not extend to property that the debtor

acquires after it files for bankruptcy relief. 11 U.S.C. § 552(a). Among other things, this provision invalidates after-acquired property clauses in security agreements with respect to property acquired postpetition. *See In re Soto*, 667 F.2d 235, 237 (1st Cir. 1981). Section 552(b)(1), in turn, states an exception to the broad reach of section 552(a), preserving for the secured party's benefit its lien on the proceeds of its preexisting collateral. 11 U.S.C. § 552(b)(1). *See Philip Morris Capital Corp. v. Bering Trader, Inc. (In re Bering Trader, Inc.)*, 944 F.2d 500, 501 (9th Cir. 1991). But as is relevant here, section 552(b)(1) also provides expressly that the secured party's lien does not extend to proceeds in derogation of section 506(c). 11 U.S.C. § 552(b)(1). Hence, to the extent a secured party's collateral is liquidated during the course of the debtor's bankruptcy case (as happened here), the secured party's lien simply does not attach to the proceeds of the sale to the extent that there remains any unpaid administrative expenses chargeable under section 506(c). Thus, by operation of law, Magna's lien in this case simply does not extend to the proceeds of its collateral to the extent of Hartford's claim. In other words, regardless of whether Magna's lien may "pass through bankruptcy," its lien does not attach to funds available to pay Hartford's claim.

In addition, section 552(b)(1) states a further limitation on the ability of a secured party's lien to extend to proceeds by providing that the lien may attach to proceeds "except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise." 11 U.S.C. § 552(b)(1). As explained in the legislative materials to section 552(b)(2) (the companion to section 552(b)(1) that also contains the identical limitation),

> the "equities of the case" provision . . . is designed, among other things, to prevent windfalls for secured creditors and to give the courts broad discretion to balance the protection of secured creditors, on the one hand, against the strong public policies favoring continuation of jobs, preservation of going concern

values and rehabilitation of distressed debtors, generally.

140 Cong. Rec. H10,768 (daily ed. Oct. 4, 1994). Similarly, the legislative history explains the reference in section 552(b) to section 506(c) as follows: "the reference to section 506(c) permits broad categories of operating expenses — such as the cost of cleaning and repair services, utilities, employee payroll and the like — to be charged against [the secured party's collateral]. . . . These rights, preserved by the list of sections, would not be waivable by the debtor, either pre- or postpetition." *Id.*

Because Magna's lien does not extend to funds properly available to pay Hartford's claim, the argument that "liens pass through bankruptcy" simply has no force in this context. Certainly it is clear from section 552(b)(1) that Magna is not entitled to the relevant funds. Because Hartford's claim remains unpaid, Hartford is entitled to the funds in order to vindicate not only its own interest, but also the policies that section 506(c) promotes, and that the Code as a whole (including section 552(b)) fully supports.

V. MAGNA IS SUBJECT TO THE BANKRUPTCY CODE'S GOVERNING REGULATIONS, INCLUDING ITS CLAIMS ALLOWANCE RULES, AND HARTFORD MAY ENFORCE THESE RULES TO THE EXTENT OF ITS ECONOMIC INTEREST.

In its initial brief, Hartford pointed out that, pursuant to section 502 of the Bankruptcy Code, any party in interest may object to the allowance and payment of any claim of any creditor, including a secured creditor. (*See* Hartford's Brief at 35). Hartford also observed that a secured creditor's claim should not be allowed and paid from the secured party's collateral in derogation of the requirements of section 506(c) (a position supported entirely by reference to section 552(b)). Because parties in interest may enforce indirectly the requirements of section 506(c) by objecting to the payment of a secured claim to the extent of any unpaid 506(c) expenses, Hartford argued

any party in interest should also be permitted to enforce the requirements of section 506(c) directly in situations in which the trustee has no ability or incentive to enforce the section's terms. (*See id.* at 36-37).

In response, Magna argues that, if Hartford believed that it had a right to object to Magna's claim, then Hartford should have objected to Magna's claim. (*See* Magna's Brief at 30-31). Apart from the fact that objecting to a secured party's claim is not a prerequisite to seeking relief under section 506(c), Magna's argument is otherwise disingenuous.

In this case, just after the Debtor filed its bankruptcy petition, Magna supplied additional funding to keep the Debtor's operations going (obviously not for altruistic reasons, but rather because Magna believed that doing so was in its own best interests). On September 6, 1991, just one day after the Debtor commenced its chapter 11 proceeding (and before virtually any other creditor was even aware of the case, including Hartford), Magna had its claim *allowed in full* as a secured claim as part of the interim order approving the additional financing. (*See* App. 157a ¶ 14; *see also* App. 190a-91a ¶ 14). Thus, Magna's argument that Hartford could have objected to the allowance of its secured claim cannot be taken seriously because Magna's claim was allowed long before the Debtor incurred its obligation to Hartford and also long before Hartford even became aware of the case.

The surreptitious allowance of Magna's claim is significant because it illustrates why parties such as Hartford must be permitted to pursue their own rights and interests in the bankruptcy context with respect to sections of the Bankruptcy Code that affect their interests. In this instance, Magna seeks to shift a portion of the costs of the proceedings onto Hartford's shoulders in derogation of section 506(c) by denying Hartford's right of participation to enforce the relief that the section recognizes. Because this would defeat the purpose of section 506(c), Magna ought not to prevail.

VI. HARTFORD'S ENTITLEMENT TO PURSUE ITS CLAIM IN THIS CASE HAS COMPELLING SOURCES WITHIN THE TEXT, LOGIC, PURPOSE, AND STRUCTURE OF THE GOVERNING STATUTORY SCHEME.

Relying again on its erroneous characterization of this controversy as a private action for money damages arising between two private parties, Magna argues that Hartford lacks the ability to pursue the relief that section 506(c) recognizes under the analysis set forth in *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527, 532 (1989). (*See* Magna's Brief at 46-50). Specifically, Magna quotes *Karahalios* for the proposition that

> the question of whether a party has a private cause of action under a statute "poses an issue of statutory construction . . . Unless such congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential implication of a private remedy simply does not exist."

(Magna's Brief at 47-48) (alteration in original).

In this instance, of course, the issue is not whether Magna may be liable to Hartford for damages under a federal statute, but how property of the Debtor's bankruptcy estate is to be distributed. Clearly Magna has no right to seize funds representing amounts that should be used to satisfy other parties' claims, and the sole issue here is whether Hartford may petition the court to enforce the governing statutory scheme where the trustee has neither the incentive nor the ability to ensure the distribution of the relevant funds to Hartford. Because proceedings under the Bankruptcy Code remain fundamentally equitable in nature, and because the function of allowing claims and distributing a debtor's estate implicates directly the court's equitable *in rem* administrative function, there can be no objection to the court's allocation of funds as the governing scheme requires on grounds that the trustee is unable or

unwilling to pursue the allocation. Because the context is distinct, reference to cases such as *Karahalios* is simply inapt.

Moreover, as this Court has recognized, different regulatory contexts may call for different methods in defining the scope of particular causes of action. *See Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 292-93 (1993) (stating that " 'where a legal structure of private statutory rights has developed without clear indications of congressional intent,' a federal court has the limited power to define 'the contours of that structure' " (quoting *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1104 (1991))). More important, the Court has recognized a broader authority to define causes of action in certain areas, such as admiralty, involving "a jurisdiction in which the federal courts have had historic, well-recognized responsibility for the elaboration of legal doctrine." *Musick*, 508 U.S. at 290 (citing *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) and *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975)).

For example, in *Cooper* the Court considered whether a defendant in an admiralty case could maintain an action for contribution against a joint tortfeasor. Acknowledging that the action could not be maintained if expressly prohibited by statute, the Court nevertheless permitted it to proceed where no such prohibition existed, concluding: "On the facts of this case, then, no countervailing considerations detract from the well-established maritime rule allowing contribution between joint tortfeasors." *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 113 (1974). Similarly, in this instance, nothing in the Bankruptcy Code prohibits application of the well-established bankruptcy rule that administrative claimants have the right to recover their claims from a secured creditor's collateral in the circumstances set forth in section 506(c).

Like admiralty, bankruptcy jurisdiction defines a unique subject matter. Predominantly equitable in nature, it is also a jurisdiction in which the courts have exercised responsibility for the elaboration of doctrine. (*See* Hartford's Brief at 17).

More important, as decisions such as *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986) and its progeny reveal, the Court has refined a special and specific analysis tailored to the bankruptcy context for dealing with questions precisely of the kind presented in this controversy. Hence, the Court should follow the analysis undertaken in *Midlantic* and conclude that Hartford has the right to enforce the priority of its claim under section 506(c).

Nevertheless, even assuming that reference to cases such as *Karahalios* is useful, Hartford's right to enforce the requirements of section 506(c) has many compelling sources, including the provisions and structure of the Bankruptcy Code as a whole (*see* Hartford's Brief at 28), the purpose of section 506(c) (*see id.* at 12-13), the relevant history (*see id.* at 20-25), the *in rem* nature of the proceedings (*see id.* at 33), and the overarching fact that Hartford is a party in interest whose participation is essential to ensure that the purpose of section 506(c) is vindicated. (*See id.* at 32, 40). In contrast, Magna's position rests entirely on the implausible inference that Congress's use of the term "trustee" was meant to condone in this case the very windfall that Congress sought to avoid in codifying section 506(c) in the first place. This is hardly a sound basis on which to deny an administrative claimant a right that similarly situated parties have enjoyed for over a century in the administration of bankruptcy proceedings. Hence, even under the Court's analysis set forth in *Karahalios*, unpaid administrative claimants have the right to enforce the requirements of section 506(c), and Hartford is therefore entitled to prevail in this instance.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Hartford's initial brief, Hartford respectfully requests that the Court determine that Hartford has the right to enforce the priority of its administrative claim under section 506(c) in this case, reverse the *en banc* decision of the Court of Appeals, and remand for further proceedings consistent with the Court's holding.

Respectfully submitted,

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IN THE
Supreme Court of the United States

HARTFORD UNDERWRITERS INSURANCE COMPANY,
Petitioner,

v.

MAGNA BANK, N.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN INSURANCE ASSOCIATION AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* AMERICAN INSURANCE ASSOCIATION AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI*

Amici curiae American Insurance Association ("AIA") and National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") respectfully submit this brief in support of the petitioner.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amici curiae* and AIA's member companies, made a monetary contribution to the preparation or submission of this brief. Petitioner Hartford Underwriters Insurance Company ("Hartford") is a member of *amicus curiae* AIA.

AIA is a national trade association consisting of over 375 property and casualty insurers. AIA's member companies write workers' compensation insurance throughout the country and account for approximately 42 percent of all such insurance sold by privately-owned insurers. National Union is one of the largest workers' compensation insurers in the country, with direct written premiums of nearly $400 million in 1998. National Union is a member company of American International Group, whose members wrote $1.3 billion in direct premiums for workers' compensation insurance during that same period. AIA has frequently participated as *amicus curiae* in litigation raising issues of importance to workers' compensation insurers.

AIA's members and National Union have a substantial interest in this case because it will determine whether they have an effective remedy for nonpayment of premiums for workers' compensation insurance sold to employers in bankruptcy proceedings. Every state except Texas requires employers, in order to finance workers' compensation benefits paid to injured employees, to purchase workers' compensation insurance or to self-insure. Insolvent businesses do not qualify to self-insure and, if they fail to purchase insurance, may be shut down by state labor departments. Thus, in order for a bankrupt business to continue in operation and attempt to reorganize successfully under chapter 11 of the Bankruptcy Code, it must purchase workers' compensation coverage.

Insurers, however, will be unwilling to underwrite such insurance for an insolvent employer unless there are adequate remedies for collecting premiums where the debtor does not or cannot pay (as occurred in this case). Insurers that write post-petition coverage for bankrupt employers are unsecured creditors. Frequently, the debtor has few if any unencumbered assets out of which to pay unsecured creditors. *See, e.g., United States v. Ron Pair*

Enters., Inc., 489 U.S. 235, 247 n.9 (1989) ("[I]t is not unusual for commercial lenders to obtain a lien on almost all of the debtor's property."). As a result, an insurer's recourse to the debtor's secured assets frequently is the only meaningful remedy for nonpayment of premiums.

The provision at issue in this case, section 506(c) of the Bankruptcy Code, 11 U.S.C. § 506(c) (1994), affords such a remedy. It allows workers' compensation insurers providing post-petition coverage to recover, as claimants for administrative expenses, unpaid premiums out of the debtor's secured assets to the extent the insurance preserves or enhances that collateral. Workers' compensation insurance coverage usually protects the secured creditor's collateral because it facilitates the employer's reorganization as an ongoing business, which tends to maximize the value of its assets. In this case, for example, workers' compensation insurance sold by petitioner Hartford allowed the debtor to continue in business for a period of time sufficient to enable it to sell off parts of the enterprise as viable businesses.

The decision of the Eighth Circuit deprives insurers of any meaningful remedy under section 506(c). Insurers (as well as other administrative expense claimants) are prohibited from seeking an order directly from the bankruptcy court requiring payments out of the secured collateral. Instead, the insurer is placed at the sufferance of the trustee's discretion in deciding whether to pursue the insurer's claim. Unlike the insurance carrier, the trustee has no economic incentive to seek payment aggressively. By the time of nonpayment, the insurance already has been provided and, under the Bankruptcy Code, the trustee generally will take the position that the insurance may not be canceled regardless of nonpayment absent relief by the bankruptcy court from the automatic stay. *See* 11

U.S.C. § 362(a) (1994). Additionally, under state insurance law, nonpayment of premium does not relieve the carrier of its obligation to pay benefits for injuries occurring while the policy was in force, even though the insurer has no premium dollars funding the payment of such claims.

AIA and National Union thus seek reversal of the decision below in order to restore to insurers a remedy that was well-established decades ago under pre-Bankruptcy Code practice and that Congress intended to preserve when it adopted section 506(c).[2]

SUMMARY OF ARGUMENT

A debtor's insolvency obviously creates a high risk that post-petition vendors to the debtor will not be paid. Two provisions of the Bankruptcy Code alleviate this risk and thereby encourage suppliers to provide goods and services necessary to preserve the debtor's assets. Section 503(b)(1)(A) gives priority to the payment of "administrative expenses" including "the actual, necessary costs and expenses of preserving the estate . . . ." 11 U.S.C. § 503(b)(1)(A) (1994). However, because the debtor frequently has insufficient unsecured assets out of which to pay such administrative expenses, section 506(c) provides for recovery from the debtor's secured assets of "the reasonable, necessary costs and expenses of preserving, or disposing of, [the secured] property to the extent of any benefit to the holder of such claim." 11 U.S.C. § 506(c) (1994).

Notwithstanding that the very purpose of section 506(c) is to protect the claimant's right to recover administrative

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[2] Both petitioner and respondent have consented to the filing of this brief, and their joint letter of consent has been filed with the Office of the Clerk of this Court.

expenses, the Eighth Circuit in this case denied the claimant its remedy of direct recourse to the bankruptcy court and instead gave the trustee exclusive power to decide whether to pursue the claim for expenses. *Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 177 F.3d 719 (8th Cir. 1999) ("*Hen House*"). The lower court reasoned that the statute's reference to "[t]he trustee" but the omission of any explicit reference to the administrative expense claimant made it clear that "only" the trustee could pursue the claim. *Id.* at 722.

The fundamental flaw in the lower court's decision was its failure to consider the pre-Bankruptcy Code practice in the area of administrative expenses. Congress intended that the Code preserve prior bankruptcy practice except in specific instances where it desired to make a change. Accordingly, in interpreting the Code, this Court has presumed that Congress continued " 'past bankruptcy practice absent a clear indication that Congress intended . . . a departure. . . .' " *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) (quoting *Pennsylvania Pub. Welfare Dep't v. Davenport*, 495 U.S. 552, 563 (1990)).

In this case, continuity is not a mere presumption but an expressly-stated legislative purpose. The authors of section 506(c) intended it to "codif[y] current law." H.R. Rep. No. 95-595, at 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6313. This Court thus has recognized that "[t]he Code rule on administrative expenses merely continues pre-Code law." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 379 (1988).

The pre-Code practice contradicts the lower court's interpretation of section 506(c). Claimants for administrative expenses long have been permitted to present their

claims directly to the bankruptcy court rather than through the trustee. *See, e.g., Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501 (1891). The rationale of these decisions was the same as for present day section 506(c): "The most elementary notion of justice would seem to require that services or property furnished" for the "benefit" of property held as collateral "should be paid from" such property "as an 'expense of justice.'" *New York Dock Co. v. S.S. Pozman*, 274 U.S. 117, 121 (1927) (citation omitted).

There is nothing in the language of section 506(c) that unambiguously reflects any congressional intention to change this pre-Code practice. To the contrary, Congress itself characterized that language as preserving the pre-Code practice.

What the Eighth Circuit characterized as the "plain meaning" of section 506(c) is really an application of the maxim of statutory interpretation known as *expressio unius est exclusio ulterius*. From the reference to "trustee," the lower court inferred an intention to exclude all others including the claimants for administrative expenses whose interests are protected by this provision. But the *expressio unius* inference is merely one among many tools of statutory construction. It does not, in itself, discern a statute's plain meaning where other interpretive tools such as pre-Code practice, legislative history and the statutory purposes suggest a contrary interpretation. At worst, the language of section 506(c), properly read in the context of other Code provisions, is ambiguous on the question of a direct remedy for administrative expense claimants. In such instances, this Court consistently has referred to the pre-Code practice, not inferences from inexact statutory language, as the best indicator of legislative intent. That pre-Code practice unambiguously supports the right

of claimants to petition the bankruptcy court directly for payment out of secured assets.

ARGUMENT

I. THERE IS A PRESUMPTION THAT THE BANKRUPTCY CODE CONTINUED PRE-CODE PRACTICE THAT CAN BE OVERCOME ONLY BY UNAMBIGUOUS STATUTORY LANGUAGE TO THE CONTRARY

This Court has crafted a specific rule for interpretation of the Bankruptcy Code. There is a presumption that Congress intended to preserve pre-Code prac ice unless the applicable provision unambiguously indicates to the contrary. This rule derives from the legislature's intent to maintain continuity in the national bankruptcy system.

"The present text of Title 11, commonly referred to as the Bankruptcy Code, was enacted in 1978 to replace the Bankruptcy Act of 1898 . . . ." *Kelly v. Robinson*, 479 U.S. 36, 44 (1986). Although the Code made many changes in the prior provisions, its purpose otherwise was to preserve the existing bankruptcy system. In order to effectuate this policy of continuity, this Court has refused to " 'read the bankruptcy code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure . . . .' " *Cohen v. De La Cruz*, 523 U.S. at 221 (quoting *Pennsylvania Pub. Welfare Dep't v. Davenport*, 495 U.S. at 563).

In order to overcome this presumption of continuity, the Court has required that the language of the provision in issue be so unambiguous as to compel a result contrary to pre-Code practice. *See United Sav. Ass'n*, 484 U.S. at 380 ("[A] major change in the existing rules would not likely have been made without specific provision in the text of the statute . . . ."); *Kelly v. Robinson*,

479 U.S. at 47 (declining "to hold that the new Bankruptcy Code silently abrogated" judicial decisions "construing the old Act").

To be sure, there have been many differences of opinion concerning whether particular statutory language is so clear-cut as to require a divergence from pre-Code practice. *See, e.g., Dewsnup v. Timm*, 502 U.S. 410 (1992); *Ron Pair Enters.*, 489 U.S. 235. But those decisions finding the statutory language to be ambiguous invariably have looked to the pre-Code practice as the principal guide for interpretation. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. Partnership*, 119 S.Ct. 1411, 1417 (1999) ("history is helpful" in understanding the "inexact language of the Code"); *see also Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494 (1986); *Kelly v. Robinson*, 479 U.S. 36; *United Sav. Ass'n*, 484 U.S. 365. This rule of statutory construction applies in construing section 506 equally as it does in interpreting other provisions of the Code. *See United Savings Ass'n*, 484 U.S. 365 (construing section 506(b)); *Dewsnup v. Timm*, 502 U.S. 410 (construing section 506(d)).

Accordingly, in determining whether section 506(c) permits a claimant to present its claim directly to the bankruptcy court, this Court's method of analysis is well-established. Pre-Code practice should be examined to determine if claimants for administrative expenses were, prior to 1978, permitted to pursue their claims directly. If so, then Congress is presumed to have preserved that remedy unless language in section 506(c) unambiguously indicates that the legislature intended to nullify prior law.

II. UNDER PRE-CODE PRACTICE CODIFIED IN SECTION 506(c), THIRD PARTIES HAD A DIRECT REMEDY FOR RECOVERY OF THEIR EXPENSES FROM SECURED COLLATERAL

"Section 506(c) was intended by Congress as a codification of the long, but somewhat inconsistent, line of cases decided under (and, in some instances, prior to) the former Bankruptcy Act expressing and applying the equitable principle that a lienholder may be charged with the reasonable costs and expenses incurred by the estate that are necessary to preserve or dispose of the lienholders collateral to the extent that the lienholder derives a benefit as a result." 4 Lawrence P. King, *et al., Collier on Bankruptcy* ¶ 506.05, at 506-126 (15th ed. rev. 1999); *see also* H.R. Rep. No. 95-595, at 357, *reprinted in* 1978 U.S.C.C.A.N. at 6313; *United Sav. Ass'n*, 484 U.S. at 379 ("The Code rule on administrative expenses merely continues pre-Code law."). That "pre-Code law" allowed claimants who provided services during bankruptcy or receivership to bring claims directly against secured collateral.

This rule was established long ago. One of the earliest cases was *Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501 (1891), where this Court authorized an attorney to recover $300 from the sale proceeds of collateral in payment for legal services that enabled the recovery and rental of train engines to the benefit of the security holders. The Court held that the attorney had a direct right of recovery against the property where the receiver lacked the capacity or will to pursue the claim:

> [W]hen he [the receiver] has not acted, and the question is presented to the court as to the liability of the property for any claim, the court is not foreclosed by the order of appointment [of the receiver],

> but may consider and determine equitably the extent of liability of the property to such claim, and what its rights of priority may be. Hence, as the receiver did not pay this claim, the parties in interest may rightfully challenge its priority, even if it were within the very letter of the order of appointment of the receiver.

Id. at 506. The rationale for this rule under pre-Code practice was the very same unjust enrichment principle as embodied in section 506(c): "We think it may fairly be held that the [secured] party who takes the benefit of such a service [by an administrative claimant] ought to pay for it; and that equity may properly decree payment therefor." *Id.* at 507.

A similar ruling was made in *In re Rotary Tire & Rubber Co.*, 2 F.3d 364 (6th Cir. 1924). Brokers who provided insurance during the bankruptcy sought direct recovery of premiums against the sale proceeds of the insured property, even though the property was subject to a $35,000 mortgage. *Id.* at 364. The lower court held, and the Sixth Circuit affirmed, that the brokers were entitled to priority for premiums because the insurance preserved the value of the mortgaged property. *Id.*[3]

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[3] Other pre-Code decisions also allowed claimants other than the trustee to bring claims directly against secured property. *See, e.g., National Acceptance Co. v. District No. 1, Progressive Mine Workers of Am. (In re Chapman Coal Co.)*, 196 F.2d 779, 781 (7th Cir. 1952) (union brought successful petition to obtain first lien on previously-secured assets of corporation for wages incurred to preserve the assets); *County of Clark v. United States*, 284 F.2d 885, 886 (9th Cir. 1960) (court did not question right of county to seek recovery of tax claim from sale proceeds subject to tax lien of United States, but denied recovery to county on the basis that taxes were "of no benefit to the United States"); *First W. Sav. & Loan Ass'n v. Anderson*, 252 F.2d 544, 550 (9th Cir. 1958) (court held that attorney as well as trustee entitled to first lien on secured property for fees for services rendered); *United States v. Henderson*, 274 F.2d 419, 422 (5th Cir. 1959) (both trustee and attorneys were parties to action for recovery of fees from mortgagee's collateral); *In re Louisville Storage Co.*, 21 F. Supp. 897 (W.D. Ky. 1936), *aff'd*, 93 F.2d 1008 (6th Cir. 1938) (employee of debtor prevailed in his request seeking to charge his wages against the lienholder, as did trustee and attorneys who sought recovery of their fees and expenses); *Citizens & Southern Nat'l Bank v. Mullins (In re Bolton Rd. Med. Ctr.)*, 433 F. Supp. 369, 371 (N.D. Ga. 1976) (both trustee and his attorneys were parties to proceeding for recovery of expenses against secured property); *In re Alaska Plywood Corp.*, 166 F. Supp. 423, 425 (D. Alaska 1958) (both trustee and stockholders committee requested and received priority against mortgaged assets superior to that of secured creditors).

The pre-Code rule in bankruptcy was itself based on a more general principle that "the cost of protecting a fund in court is everywhere recognized as a dominant charge on that fund." *Adair v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 303 U.S. 350, 360-61 (1938). This principle "applies even in ordinary bankruptcy proceedings since the secured creditor benefits from the disbursement." *Id.* at 361 (footnote omitted). The Court has described the power to charge expenses against court-protected property as "an *in rem* jurisdiction springing from possession of the property which is necessary in order that the court may adequately care for the property." *Warren v. Palmer*, 310 U.S. 132, 139 (1940).

In applying this longstanding principle outside of bankruptcy, this Court did not limit the remedies for recovery to actions by court representatives on behalf of the claimant but also allowed the claimant to proceed directly against the secured parties whose collateral was benefited. *New York Dock Co. v. S.S. Poznan*, 274 U.S. 117 (1927), is an exemplar of this direct remedy. A vessel with cargo was seized by a United States marshal and held in his custody while docked at a wharf. The wharf owner then sought recovery of payment for his services from the proceeds of the ship's sale. Respondents, the

owners of the cargo who held liens on the ship, objected. *Id.* at 118-19.

Reversing the Second Circuit, the Court held that the wharf owner was entitled to preferential payment from the proceeds prior to any distribution to the lienholders:

> The most elementary notion of justice would seem to require that services or property furnished upon the authority of the court or its officer, acting within his authority, for the common benefit of those interested in a fund administered by the court, should be paid from the fund as an 'expense of justice.'

Id. at 121 (citation omitted). For present purposes, the salient feature of the Court's holding was its permission for the wharf owner to bring its claim directly rather than through the government official who administered the collateral (the marshal). The Court emphasized that it was applying the "familiar rule of courts of equity when administering a trust fund or property *in the hands of receivers*." *Id.* (emphasis added).

In sum, the pre-Code bankruptcy practice, derived from general equity practice, allowed administrative expense claimants such as Hartford to proceed directly to bankruptcy court to obtain payment out of the collateral of secured creditors so long as the goods or services provided by the claimant had protected that collateral. This was an integral feature of the pre-1978 practice that Congress intended to preserve in section 506(c).

III. THE LANGUAGE OF SECTION 506(c) REFLECTS NO INTENTION TO RESTRICT PRE-CODE PRACTICE ON CLAIMANT REMEDIES

Nothing in the language or history of section 506(c) provides any indication that Congress desired to deny claimants a direct remedy for recovery of administrative

expenses even though they had such a remedy under prior law. The legislative history, far from evidencing any intention of changing prior law, indicates that Congress intended to preserve it. Nor does the plain meaning of the statutory language, read in the context of related provisions, compel a conclusion at odds with the pre-Code practice and legislative history.

The Eighth Circuit's decision is premised almost entirely on the canon of statutory construction referred to as *expressio unius est exclusio alterius.* The lower court read the reference in section 506(c) to the trustee, combined with the failure to explicitly mention the claimants on whose behalf the trustee acted, as making it "clear and unambiguous" that the claimant lacks a direct remedy. *Hen House*, 177 F.3d at 723. In reaching that conclusion, the Eighth Circuit erroneously elevated one among many tools of statutory construction to trump other maxims of legislative construction that point to a contrary interpretation.

Expressio unius is nothing more than a possible negative inference to be drawn from the mention of one thing but not another. But "[n]ot every silence is pregnant" and thus *expressio unius* is not an absolutist rule of statutory construction. *Illinois Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983); *see also El Paso Natural Gas Co. v. Neztsosie*, 119 S. Ct. 1430, 1439 (1999) ("[n]ow and then, silence is not pregnant"). For instance, this Court has held that maxims such as *expressio unius* have " 'long been subordinated to the doctrine that courts will construe the details of an Act in conformity with its dominating general purpose.' " *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983) (citation omitted); *see also El Paso Natural Gas Co. v. Neztsosie*, 119 S. Ct. at 1438 (rejecting "most zealous

application of the maxim *expressio unius est exclusio alterius*").

Expressio unius is, rather, only one of several methods available to interpret section 506(c). *See, e.g., Lindh v. Murphy*, 521 U.S. 320, 337 (1997) (Rehnquist, C.J., dissenting) (criticizing majority decision because it "relies on one canon of statutory interpretation, *expressio unius est exclusio alterius*, to the exclusion of all others"). In addition to ignoring pre-Code practice, the Eighth Circuit failed to consider other principles of statutory construction that regularly have been applied by the Court in bankruptcy cases. In particular, " '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

There are several provisions in the Bankruptcy Code where Congress inserted the term "only" to restrict the eligibility of parties to participate in bankruptcy proceedings. For example, with respect to the most important eligibility question under bankruptcy law—who may be a debtor—section 109(a) provides that "*only* a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title." 11 U.S.C. § 109(a) (1994) (emphasis added). Subsection (b) through (f) of section 109, which define the entities that are eligible for relief under the various chapters of the Bankruptcy Code, also uniformly use the word "only" to restrict eligibility. 11 U.S.C. § 109(b)-(f). Similarly, section 321(a), governing eligibility of trustees, states that "[a] person may serve as trustee in a case under this title *only* if such person" meets the requirements set forth therein. 11

U.S.C. § 321(a) (emphasis added). And section 702(a) provides that "[a] creditor may vote for a candidate for trustee *only* if such creditor" meets various requirements. 11 U.S.C. § 702(a) (emphasis added).

Sections 109, 321 and 702 illustrate that Congress used the term "only" when it wanted to be clear about its exclusion of all but the named parties from eligibility for coverage under the Code. Undoubtedly, this was because the plain meaning of "only" is exclusionary, that is, the term is synonymous with "solely" or "exclusively." *Webster's Third New International Dictionary* 1577 (1981); *see also Black's Law Dictionary* 1089 (6th ed. 1990) ("only" means "solely," "exclusive," "nothing else or more").

Congress' approach when it wanted to limit remedies or eligibility is confirmed by its selective usage of the term "only." The word "only" did not appear in any of the Bankruptcy Act provisions that were the predecessors to sections 109, 321 and 702(a). See 11 U.S.C. § 2a(1) (repealed); 11 U.S.C. § 45 (repealed); 11 U.S.C. § 44a (repealed). Congress' deliberate amendment of these provisions to insert the word "only" but its omission in others indicates a conscious decision to make the former provisions exclusive but the latter provisions nonexclusive. *Cf. Patterson v. Shumate*, 504 U.S. 753, 758 (1992) (when Congress meant to refer to state law under the Bankruptcy Code, it used the term "state law").

Thus, the omission of the modifier "only" when the trustee is mentioned in section 506(c) strongly suggests that Congress did not intend to limit the claimant from direct recourse to the bankruptcy court. Rather, if Congress had wanted to change pre-Code practice and deny a direct remedy to administrative expense claimants, "one would expect Congress to have made unmistakably clear

its intent to" do so by providing that "only" the trustee could seek recovery. *Cohen v. De La Cruz*, 523 U.S. at 222.

Another relevant maxim of statutory interpretation is that "equivalent words have equivalent meaning when repeated in the same statute." *Cohen v. De La Cruz*, 523 U.S. at 220 (citing *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994)). For example, in *Patterson v. Shumate*, the Court noted that its construction of the term "applicable nonbankruptcy law" as used in section 541(c)(1), to include both federal and state law, "accords with prevailing interpretations of that phrase as it appears elsewhere in the Code." 504 U.S. at 758-59 n.2.

The "prevailing view" of other provisions of the Code worded similarly to section 506(c) is that non-trustees have the right to seek relief directly rather than through the trustee only. For example, the "avoidance" provisions of the Code uniformly provide that "*the trustee . . . may* avoid" various liens and transfers without express reference to any other party in interest. 11 U.S.C. §§ 544(a), 545, 547(b) (1994); 11 U.S.C.S. § 548(a) (Supp. 1999); 11 U.S.C. § 549(a) (1994) (emphasis added).[4] A majority of circuit courts, nevertheless, have held that creditors and their committees may bring such avoidance actions. *See Canadian Pac. Forest Prods. Ltd. v. J.D. Irving, Ltd. (In re Gibson Group, Inc.)*, 66 F.3d 1436, 1438 (6th Cir. 1995) (granting individual creditor right to bring suit under sections 547 and 548 to recover

[4] "Avoidance" provisions authorize recovery, on behalf of the bankruptcy estate, of certain improper or unauthorized transfers of money or liens made by a debtor to third parties. For example, § 547 authorizes the recovery of preferential transfers made within 90 days (or in the case of insiders, one year) before the bankruptcy petition. The other provisions cited above address unperfected liens (§ 544), statutory liens such as those for rent (§ 545), fraudulent transfers (§ 548) and unauthorized post-petition payments (§ 549).

preferential or fraudulent conveyances); *Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1362-63 (5th Cir. 1986) (unsecured creditors committee had right to bring action under section 547); *Unsecured Creditors Comm. of Debtor STN Enters., Inc. v. Noyes (In re STN Enters.)*, 779 F.2d 901, 904 (2d Cir. 1985) (committee had right to bring preference action); *Official Unsecured Creditors Comm. of Suffola, Inc. v. United States Nat'l Bank (In re Suffola, Inc.)*, 2 F.3d 977, 979 n.1 (9th Cir. 1993) (same).

Finally, this Court has held that *expressio unius* "cannot properly be applied to a situation . . . where the remedial purposes of the Act[] would be undermined by a presumption of exclusivity." *Herman & MacLean v. Huddleston*, 459 U.S. at 387 n.23. That would be true here. Section 506(c) is an exception to the general rule that "the expenses associated with administering a bankruptcy estate are not chargeable to a secured creditor's collateral or claim, but must be borne out of the unencumbered assets of the estate." *See* 4 Lawrence P. King, *et al.*, *Collier on Bankruptcy* ¶ 506.05, at 506-125. The purpose of this exception "is the prevention of a windfall to the secured creditor: a secured creditor should not reap the benefit of actions taken to preserve the secured creditor's collateral without paying the cost." *Id.*

That purpose would be thwarted if the party protecting the collateral cannot sue directly to recover payment but must rely on the trustee's discretionary decision to assert the claim. The trustee lacks the same economic incentive as the claimant to pursue recovery. "[I]f the trustee does not have available funds to pay the claimant, the trustee has no economic incentive to seek a recovery under Section 506(c) with respect to amounts that will be paid over to the claimant. As a result, the secured creditor may

obtain a windfall at the expense of the unpaid claimant." 4 Lawrence P. King, *et al.*, *Collier on Bankruptcy*, ¶ 506.05, at 506-142-43.

This case is an example of this disincentive. The trustee had little reason to press Hartford's claim because the automatic stay provision in section 362 may have prevented Hartford from canceling the insurance and because Hartford was obligated to pay claims under the policy even in the event of nonpayment of premium. An interpretation of section 506(c) as precluding the claimant from asserting its claim in bankruptcy court would thus be inconsistent with the equitable principle underlying this provision—prevention of unjust enrichment. *See Kelly v. Robinson*, 479 U.S. at 49 ("There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction.").

Conversely, an interpretation of section 506(c) as denying a direct remedy to claimants is not necessary, as the lower court reasoned, to prevent preferential treatment of one claimant compared to other claimants or other unsecured creditors. *Hen House*, 177 F.3d at 723; *see also Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 484 (4th Cir. 1994). The Code expressly affords the administrative expense claimant a priority over pre-petition unsecured creditors. 11 U.S.C. § 507(a).

Nor would affording a direct remedy to claimants such as Hartford give them a preference over other administrative expense claimants not contemplated by the Code. Numerous bankruptcy courts have recognized that, "from a practical standpoint," equality of treatment among administrative claimants "does not exist." *In re Vernon Sand & Gravel, Inc.*, 109 B.R. 255, 257 (Bankr. N.D. Ohio 1989). This is because so-called "operational payments" made by the trustee or debtor in the ordinary

course of business—for example, for employee wages, utilities, supplies and taxes—are paid in full during the course of the bankruptcy proceeding. *Id.*; *see also In re Lochmiller Indus., Inc.*, 178 B.R. 241, 247 (Bankr. S.D. Cal. 1995); *Guinee v. Toombs (In re Kearing)*, 170 B.R. 1, 7 (Bankr. D.D.C. 1994); *In re Telesphere Communications, Inc.*, 148 B.R. 525, 531 (Bankr. N.D. Ill. 1992). Such payments are treated as final and not subject to later disgorgement; otherwise, if these expenses were subject to a pro-rata reduction, businesses operating under chapter 11 could not retain employees, use outside vendors or pay for utilities. *Vernon Sand & Gravel*, 109 B.R. at 257. The result is a "de facto" preference for operational payments, which are paid in full when services are rendered, over other administrative expenses. *Telesphere Communications*, 148 B.R. at 531. Indeed, if the insurance premiums owed to Hartford had been paid in a timely manner, there would have been no question that Hartford would have been entitled to keep the money—notwithstanding any inequality of treatment that would have resulted.

More generally, concerns about preferential treatment do not apply where the source of the funds to pay the claimant is secured collateral rather than unencumbered assets, as is the case under section 506(c). The principle of equitable distribution applies only to distribution of *unencumbered* assets, and not to the proceeds of *collateral. See, e.g., United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest)*, 793 F.2d 1380, 1387 (5th Cir. 1986), *aff'd*, 484 U.S. 365 (1988). This in part explains why creditors with oversecured claims are entitled to recover interest (which comes from collateral) notwithstanding preferential treatment of the secured creditor while undersecured creditors are not since the payment would come from unencumbered assets to the detriment of other unsecured creditors.

Cf. Ticonic Nat'l Bank of Sprague, 303 U.S. 406, 411-12 (1938) (holding that doctrine of equal distribution does not apply when source of payment is *res* subject to lien rather than unencumbered assets).

In summary, the lower court's exclusive reliance on *expressio unius* was misplaced for several reasons. The inference of exclusionary intent is inconsistent with the more explicit wording Congress used in other Code provisions where it wanted to restrict the rights of a party in interest. The Eighth Circuit's reading also squarely conflicts with the equitable and remedial objective of section 506(c), which was to insulate volunteer sellers to the debtor from the risk of nonpayment. Of most importance, nothing in the language of section 506(c) contradicts Congress' stated intent of preserving pre-Code practice, including the direct remedy afforded to administrative expense claimants.

CONCLUSION

The judgment of the Eighth Circuit should be reversed.

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HARTFORD UNDERWRITERS INSURANCE COMPANY,
Petitioner,

v.

MAGNA BANK, N.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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The Commercial Finance Association ("CFA") respectfully submits this brief as *amicus curiae* in support of the respondent.[1]

STATEMENT OF INTEREST

CFA is the national trade association for financial institutions that provide asset-based commercial financing and factoring services to business borrowers. Among the nearly 300 members of CFA are substantially all of the major money center and important regional banks and other large and small commercial lenders. CFA members provide financing to businesses on an international, national, regional and local scale. Most of the borrowers served by CFA members depend on secured financing to operate and grow. This financing is generally secured by various forms of personal and real property collateral, including accounts receivable, inventory, equipment, and other property owned by the

[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* states that no counsel for any party to this dispute authored this brief in whole or in part, and that no person or entity, other than *amicus curiae* and its member entities, as part of their regular contributions and support of the CFA, made a monetary contribution to the preparation or submission of this brief. Capital Factors, Inc., a wholly owned subsidiary of respondent Union Planters Bank, N.A. (successor to Magna Bank, N.A.), is a member of *amicus curiae* CFA. Both petitioner and respondent have consented to the filing of this brief, and a letter evidencing such consent has been filed with the Office of the Clerk of this Court. *See* Sup. Ct. R. 37.3.

borrowers. Secured financing provided by CFA members comprises a substantial portion of the national credit market.

CFA has a substantial interest in this case because the position advocated by petitioner would subject its members, as secured lenders, to surcharge claims in bankruptcy from any entity which dealt with a bankruptcy estate and remained unpaid. Such a rule would constitute a dramatic expansion of the surcharge rights which such entities would have against secured lenders outside of bankruptcy, and would make secured lenders potential guarantors of the unpaid administrative expenses of a bankruptcy estate. For the reasons set forth below, CFA believes that such a rule is contrary to the language of § 506(c) of the Bankruptcy Code[2] as well as the structure and logic of the Bankruptcy Code, and would be an unjustified invasion of lien rights which, as a general matter, are supposed to pass through bankruptcy unaffected.

SUMMARY OF ARGUMENT

Petitioner argues that § 506(c) creates a private right of action which permits creditors that deal with a bankruptcy estate to surcharge a secured creditor's collateral. The private right of action which petitioner seeks, however, is far

[2] Except as otherwise noted, all statutory references herein are to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*

broader than the rights it otherwise would have against respondent secured creditor under applicable state law. There is no indication, and no plausible reason to believe, that in crafting a provision which grants surcharge rights solely to "the trustee," Congress intended to both federalize and liberalize the applicable state law and to subject secured creditors to claims which they would not have faced outside of bankruptcy.

In addition, petitioner's reading of the statute is inconsistent with the Bankruptcy Code's overall theme and structure, which defines the rights and remedies of parties with respect to their relationship with the bankruptcy estate, and not with relationship to one another. It would also violate the general premise of the Bankruptcy Code that, except where explicitly provided, secured creditors' liens are to pass through bankruptcy unaffected, and would engraft a new judicially-created priority of distribution onto the precisely detailed schedule of priorities now set forth in the statute. Finally, by exposing secured creditors to the risk of having to pay the unpaid administrative expenses of a bankruptcy estate, petitioner's construction will make it more likely that secured creditors will seek early relief from the stay, thereby reducing the likelihood of reorganizations and of recoveries for prepetition creditors.

ARGUMENT

I. PETITIONER'S POSITION WOULD CREATE A SUBSTANTIVE BANKRUPTCY RIGHT OF ACTION TO SURCHARGE COLLATERAL FAR BROADER THAN APPLICABLE NON-BANKRUPTCY LAW

Outside of bankruptcy, there is a venerable body of law which determines when someone is entitled to payment for conferring a benefit on another with whom he otherwise does not have a contractual relationship. This is the law of unjust enrichment or restitution, sometimes denominated as *quantum meruit*.

An entity seeking to collect on a theory of unjust enrichment or restitution must satisfy certain criteria and overcome various defenses. *See generally* RESTATEMENT OF RESTITUTION (1937). Most important for present purposes is the general rule that a party performing under a contract with one entity cannot collect on a restitution theory from a different entity which may have benefited from the performance in question. RESTATEMENT OF RESTITUTION § 110 (1937).[3] The burden on the party seeking restitution is

[3] In the words of the RESTATEMENT:

> A person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to
> *footnote continued on next page*

even greater when it seeks recovery from a secured creditor, because the restitution claim undermines the clear priority rules sought to be established by Article 9 of the Uniform Commercial Code. *See generally* 1 Barkley Clark, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 3.14[3], at 3-212 to 3-215 (1999) ("Allowing unsecured suppliers to prime secured lenders is upside down.").[4]

Certain state courts recognize an exception to the secured creditors' priority, and permit restitution from a

> restitution from the other merely because of the failure of performance by the third person.

[4] Notably, apart from any possible applicability of unjust enrichment law, the respective rights of petitioner and respondent would have been determined according to standard lien priority rules, under which respondent secured creditor would prevail. For example, a seller of goods to an insolvent entity, which is entitled to reclamation under section 2-702 of the Uniform Commercial Code, ordinarily has its rights subordinated to those of a secured creditor with a security interest in those goods – even though the secured creditor obviously benefited when the goods became part of its collateral. 2 Barkley Clark, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 10.06[4], at 10-118 (1999). Thus, the fact that the rights of a secured creditor are superior to those of a seller whose goods directly augmented the amount of the secured creditor's collateral is indicative of the limited extent to which the rights of secured creditors can be subordinated to those of unsecured creditors outside of bankruptcy.

secured creditor which initiated or encouraged the performance that gave rise to its direct benefit. *Ninth Dist. Prod. Credit Ass'n v. Ed Duggan, Inc.*, 821 P.2d 788, 794-98, 800 (Colo. 1991) (*en banc*). But even this exception is not uniformly accepted; there is "an apparent split of authority" among the various state courts, which discrepancy arguably "can be reconciled, although the courts' analyses are concededly in tension." *Id.* at 795. *See also Knox v. Phoenix Leasing Inc.*, 35 Cal. Rptr. 2d 141, 144-45 (Cal. Ct. App. 1994) (describing courts permitting restitution from secured creditors as contrary to the "majority position" but suggesting that the disagreement "is not nearly so profound as appears at first glance.").

Notably, the Missouri law on the subject, which otherwise would have been applied here, is even more restrictive. Under Missouri law, an unjust enrichment action could not overcome an Article 9 lien priority absent a showing of the secured creditor's fraud. *Commerce Bank, N.A. v. Tifton Aluminum Co.*, 217 B.R. 798, 802 (W.D. Mo. 1997). *Accord, Peerless Packing Co. v. Malone & Hyde, Inc.*, 376 S.E.2d 161, 164 & n.4 (W. Va. 1988) (recognizing only a fraud exception to secured creditors' priority).

In this case, petitioner, an insurance company, provided workers' compensation insurance to the debtor Hen House International, Inc., substantially all of whose assets were pledged to respondent Magna Bank. But for the intervention of bankruptcy, it is absolutely clear that respondent would not have been liable to petitioner for the unpaid insurance premiums. Petitioner's contractual relationship was exclusively with the debtor, and under the rule in RESTATEMENT § 110 it could not look to respondent or any other third party for compensation when the debtor did not pay. Moreover, among other things, there was no evidence

below that respondent initiated or encouraged petitioner to provide insurance, as required under *Duggan*, *supra*, and there was certainly not a hint of fraud by the secured creditor, as required by the applicable Missouri law.

Nevertheless, petitioner argues that once bankruptcy intervened, its substantive entitlements changed. It maintains that § 506(c) entitles it to recover all of "the reasonable, necessary costs and expenses of preserving, or disposing of," respondent's collateral, "to the extent of any benefit" which respondent received. This standard for recovery omits many of the applicable state law hurdles to restitution from third parties. Petitioner nowhere explains why the intercession of bankruptcy should be deemed to create a new private right of action which is more liberal than the applicable state law restitution rule.

The most astounding part of petitioner's contention is that it is based on a statute which, by its terms, confers the right to surcharge collateral only on the trustee (a term which includes those who, like the debtor-in-possession under § 1107(a), exercise the rights of a trustee). Section 506(c) is explicit – "The *trustee* may recover from property securing an allowed secured claim . . ." (emphasis supplied). Especially in bankruptcy cases, this Court has adhered to the common-sense principle that statutes should be interpreted in accordance with their plain meaning. *E.g.*, *Rake v. Wade*, 508 U.S. 464, 471 (1993); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Where a statute gives a surcharge right to trustees, it makes little sense to interpret it as a mandate to expand the state law rights of non-trustee entities, particularly where the state law on the subject is not uniform and even the most liberal state law cases are far more restrictive than § 506(c).

II. ESTABLISHING A PRIVATE RIGHT OF SURCHARGE IS CONTRARY TO THE SCHEME AND STRUCTURE OF THE BANKRUPTCY CODE

Even apart from its plain language, § 506(c) is not susceptible to interpretation as establishing a private right of action for surcharge because such an interpretation would be contrary to the structure and scheme of the Bankruptcy Code. Throughout, the Bankruptcy Code prescribes the rights of parties only with relation to the bankruptcy estate,[5] and eschews any attempt to declare the rights of nondebtor parties as between themselves. In fact, in the two instances in which the Code addresses the rights of parties *inter sese*, it is only to declare that those rights are preserved as they were apart from the Bankruptcy Code. One of these instances is § 510(a), which declares that subordination agreements remain enforceable to the same extent as under applicable nonbankruptcy law. The other instance is § 524(e), which generally provides that a bankruptcy discharge does not affect the obligations of nondebtors (such as sureties and guarantors) with respect to claims against the estate. In effect, therefore, where the bankruptcy estate is not involved, the Bankruptcy Code's attitude towards intercreditor rights is one of non-involvement.[6]

Given this consistent pattern, there is no plausible reason to interpret § 506(c) as the single instance of Bankruptcy Code legislation which modifies the state law rights of nondebtor entities with respect to each other, as implied by petitioner's assertion that § 506(c) creates a private right of action for surcharge. The Bankruptcy Code is simply not

[5] The commencement of a bankruptcy case creates a bankruptcy estate. § 541. Entities have claims against or interests in the estate, §§ 501-03; they are required to surrender any estate property to the estate, § 542; and they are susceptible to avoidance actions and other claims by the estate, §§ 544-51. At the completion of the case, parties receive their distributions from the estate, whether under the liquidation provisions of chapter 7 or the reorganization provisions of chapter 11 and 13, or under special provisions related to municipalities and railroads. And when the Bankruptcy Code recognizes that the rights of some parties are superior to those of others, it does so only in terms of the ranking of those rights vis-à-vis the estate. See, for example, §§ 502(b) (disallowance of certain claims against the estate); 503 (administrative claims); 507 (priority claims); 510(b) (subordination of securities claims); 726 (priority of distributions in chapter 7 liquidations); 1129(b)(2) (priority of distributions in chapter 11 reorganizations).

[6] To be sure, a bankruptcy court can resolve intercreditor rights, provided such resolution could have an impact on the bankruptcy estate and therefore would be within the "related to" jurisdiction of 28 U.S.C. § 157(a). *E.g., Dogpatch Properties, Inc. v. Dogpatch U.S.A., Inc. (In re Dogpatch U.S.A., Inc.)*, 810 F.2d 782 (8th Cir. 1987) (bankruptcy court has "related to" jurisdiction over claims of a creditor against a nondebtor guarantor). In that situation, however, the substantive rights between the nondebtors are determined under applicable nonbankruptcy law, and not by the Bankruptcy Code. Petitioner, by contrast, would read § 506(c) as establishing a *substantive* right to surcharge.

concerned with the relationship among individual nondebtor entities, but only with the collective process for addressing creditor claims and rehabilitating financially troubled companies. See Thomas H. Jackson, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 7 (1986) ("All agree that [the bankruptcy law] serves as a collective debt-collection device."). It is for that reason, for example, that the avoidance rights of individual creditors under state law are vested in the trustee, to be utilized for the benefit of the estate as a whole. *Moore v. Bay (In re Sassard & Kimball Inc.)*, 284 U.S. 4 (1931) (mortgage void under state law as to certain creditors would be avoided for the benefit of all creditors); *see also* §§ 544 (trustee's "strong arm powers"); 548 (avoidance of fraudulent conveyances); 551 (preservation of avoided transfers and liens for the benefit of the estate). It would be anomalous indeed if the Bankruptcy Code which, in the avoidance context, appropriates creditor avoidance actions for the collective benefit of the estate, would in the surcharge context provide for surcharges by and for the exclusive benefit of individual creditors – especially through language which by its terms gives that surcharge right only to the trustee.

It is for this reason that the Bankruptcy Code, consistent with its literal language, contemplates that the trustee serve as the focal point for the claims of those who provide services to the estate, and be the one charged with the task, if appropriate, of seeking to surcharge secured creditors for those services. Entities which provide goods or services to the estate after the petition date are granted administrative claims under § 503 and are entitled to a priority in repayment under § 507, ahead of prepetition unsecured claims. Having contracted with the estate, these entities are to look to the estate for payment – and it is hardly unfair that the Bankruptcy Code gives them no additional rights, beyond

those which they might otherwise have under state law, to obtain payment for those services from anyone else, including secured creditors. The trustee for the estate, in turn, is empowered under § 506(c) to surcharge collateral for the benefit conferred on the secured creditor by the trustee's incurring of those administrative expenses. Contrary to the assertion of petitioner and certain lower courts,[7] the trustee has every incentive (as well as the fiduciary duty) to pursue meritorious § 506(c) claims for the benefit of the estate, because any recovery would be used to defray unpaid administrative claims or provide recovery for prepetition creditors. But there is nothing in this scheme which suggests that § 506(c) allows unsecured creditors to ignore the trustee, and independently pursue new Bankruptcy Code-created causes of action against secured creditors.

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[7] Petitioner's Brief at 43-46; *Equitable Gas Co. v. Equibank, N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91, 94 (3d Cir. 1986).

III. PETITIONER'S INTERPRETATION IS INCONSISTENT WITH THE GENERAL BANKRUPTCY PRINCIPLE THAT LIENS ARE TO PASS THROUGH BANKRUPTCY UNAFFECTED

Petitioner's assertion that § 506(c) was intended to create a private right of action for surcharge is also inconsistent with the limited extent to which the Bankruptcy Code purports to affect the rights of secured creditors. As this Court recognized in *Dewsnup v. Timm*, 502 U.S. 410, 418-20 (1992), an underlying principle of both the Bankruptcy Code and its predecessor statutes is that liens pass through the bankruptcy case unaffected. *See also Long v. Bullard*, 117 U.S. 617 (1886); *FDIC v. Union Entities (In re Be-Mac Transp. Co.)*, 83 F.3d 1020, 1025, 1027 (8th Cir. 1996) (secured claim survives bankruptcy even though proof of claim was denied as untimely; liens survive unless extinguished under a plan in which creditor participates).

Given this fundamental premise, when the Bankruptcy Code seeks to affect the rights of secured creditors, it does so both narrowly and explicitly. This largely occurs in two sets of provisions, one of which seeks to establish the dimensions of the secured claim, and the other which deals with how the

secured claim must be treated.[8] The latter is exemplified by provisions like § 1129(b)(2)(A), which require that the secured creditor retain its liens and receive a distribution which, in essence, is the "indubitable equivalent" of its secured claims. See also § 1124, which allows claims (including secured claims) to be treated as "unimpaired" by restoring the "legal, equitable, and contractual rights" of such claim after curing defaults. The thrust of these claim treatment provisions is that unless the secured creditor consents, it must receive the equivalent of its full nonbankruptcy entitlements – *i.e.*, that although its ability to obtain the benefit of its secured claim may be deferred in bankruptcy, ultimately it will be protected to the extent of the value of its collateral. *United Savs. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988).

The same solicitous and restrained approach towards secured creditors' rights is evident from the provisions addressing the determination of secured claims. Here, the governing principle is set forth in § 506(a), which defines a secured claim as equal to the value of the collateral which secures the debt. *See Nobelman v. American Savs. Bank*, 508 U.S. 324, 328 (1993) ("Section 506(a) provides that an allowed claim secured by a lien on the debtor's property 'is a

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[8] In addition, secured claims are subject to the automatic stay provisions of § 362, enjoy rights of adequate protection under § 363(e), and can be subject to the avoidance provisions of §§ 544-51.

secured claim to the extent of the value of [the] property'; to the extent the claim exceeds the value of the property, it 'is an unsecured claim.'"). Section 506(b) further recognizes that to the extent of the value of the collateral, the secured creditor is entitled to all of its state law rights, including interest whether or not consensual. *Ron Pair*, 489 U.S. at 238–39. *See also Rake*, 508 U.S. at 470-73 (oversecured mortgages in chapter 13 entitled to interest on arrearages). And in valuing the collateral at the time of reorganization, this Court has recently recognized that the appropriate measure is not the low collateral value which the secured creditor could obtain at foreclosure, but the higher replacement value which the debtor would have to pay to acquire a similar asset from another source. *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997).

Each of these statutory provisions and decisions of this Court reflects the underlying premise of the Bankruptcy Code that except as explicitly provided in the statute, secured creditors' liens are to pass through bankruptcy unaffected. The statute and case law generally reflect a deferential approach towards secured creditors' substantive state law entitlements.

The Bankruptcy Code does recognize that sometimes, an increase in collateral value is not a function of the creditor's prepetition interests in the collateral itself, but rather results from expenditures by the bankruptcy trustee. The Code accordingly seeks to ensure that the secured creditor's claim is not enhanced at the estate's expense. This concept is reflected in § 552. Subsection 552(a) announces the general rule of cleavage – that a secured creditor's prepetition lien does not extend to property acquired by the estate after the petition date. Subsection 552(b) provides for the exception to that general rule. To the extent that the secured creditor's

claim includes proceeds, products, offspring or profits of collateral, it equally extends to proceeds, products, offspring and profits acquired by the estate postpetition, "except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise." This caveat is intended to encompass a situation "where raw materials, for example, are converted into inventory, or inventory into accounts, at some expense to the estate, thus depleting the fund available for general unsecured creditors . . ." H.R. Rep. No. 95-595 at 377 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5877. *See also* S. Rep. No. 95-989 at 91 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6333. In that instance, the secured creditor is not allowed a claim for the entire value of the inventory or accounts receivable because the estate is entitled to its share of the collateral value added through its expenditures.

Section 506(c) is a provision analogous to § 552(b). Section 506(c) provides that the creditors' collateral value is to be adjusted by the amounts expended by the estate to obtain such collateral value – "the reasonable, necessary costs and expenses of preserving, or disposing of, such property," but only "to the extent of any benefit" to the holder of the secured claim. The concept here is the same concept as in § 552(b). The secured creditor should not benefit from expenditures by the estate which enhance the value of its collateral, without accounting to the estate for the benefit it thereby received. Because the lien is to pass through bankruptcy unaffected, it should neither be reduced nor augmented as a result of the bankruptcy. But except for the limited circumstances in §§ 506(c) and 552(b) in which the estate has expended funds to enhance the collateral, "[a]ny increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the creditor." *Dewsnup*, 502 U.S. at 417.

Section 506(c) is thus similar to § 552(b) in that each is directed at the relationship between the secured creditor and the estate. Section 506(c) is part of a section entitled "Determination of Secured Status," and follows subsections which define the secured claim in terms of its collateral value (§ 506(a)) and require that the entire collateral value be dedicated to satisfying the secured creditor's state law rights, including postpetition interest and applicable fees and charges (§ 506(b)). Like § 552(b), the purpose of § 506(c) is to require a surrender back to the estate of some portion of the value of the collateral – the benefit resulting from the estate's expenditures. For that reason, § 506(c) is phrased in terms of a recovery by the representative of the estate, the trustee. But there is nothing in § 506(c) which remotely suggests that it was intended to establish a new rule of intercreditor distributions, let alone create a new rule of subordination of the rights of secured creditors to the unpaid providers of workers' compensation insurance or other postpetition services to the debtor. If Congress intended to establish such a new subordination right, the place to do so was as part of the subordination provisions of § 510, and not in § 506, which is devoted to defining the scope of a secured creditor's claim vis-à-vis the estate, and not vis-à-vis other creditors.[9]

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[9] Both petitioner and its *amici* cite certain pre-Code cases in which third parties pursued surcharge claims against secured creditors' collateral. There is no indication in any of these cases that the standing question was raised, so they are slender support for petitioner's argument here.

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In sum, to the extent that petitioner may have a claim against respondent under applicable nonbankruptcy law, that claim is preserved under the Bankruptcy Code, and may even be cognizable under the bankruptcy court's "related to" jurisdiction in 28 U.S.C. § 157(a). See *Commerce Bank, N.A. v. Tifton Aluminum Co.*, 217 B.R. 798, 800-02 (W.D. Mo. 1997) (deciding unjust enrichment claim against secured creditor under "related to" jurisdiction). But that is a far cry from petitioner's assertion that § 506(c) was intended to create a private right of action for surcharge which would afford petitioner broader rights than those otherwise available to it under applicable nonbankruptcy law. Given the general

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In any event, these handful of cases in which surcharge claims were pursued without the participation of the trustee are isolated ripples among the waves of litigated cases in which trustees were involved, which generally focused on whether the expenses in question were preservation costs chargeable to the secured creditor or general costs of administration which were not. *See generally* 4B COLLIER ON BANKRUPTCY ¶ 70.99[6], at 1223-43 (James Wm. Moore, *et al.*, eds., 14th ed. 1978). Thus, these pre-Code citations fall far short of supporting petitioner's position that there was a longstanding history of surcharges by non-trustees which Congress intended to perpetuate, and the legislative history gives no indication that Congress was aware of the cases which petitioner has now managed to find. See, *e.g.*, S. Rep. No. 95-989 at 68 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5854 ("Subsection (c) also codifies current law by permitting *the trustee* to recover from property . . . the reasonable, necessary costs and expenses of preserving, or disposing of, the property.") (emphasis supplied).

thrust of the bankruptcy laws that secured creditors' lien rights pass through bankruptcy unaffected, any Congressional enactment to curtail those lien rights needs to have been explicit. That explicitness is not supplied by § 506(c), which by its terms is limited to the surcharge rights of the trustee.

IV. THE ADMINISTRATIVE PRIORITY WHICH PETITIONER SEEKS IS WITHOUT SUPPORT IN THE BANKRUPTCY CODE, AND WOULD LEAD TO ANOMALOUS AND CONTRADICTORY OUTCOMES

By asserting a unique right to surcharge respondent's collateral, petitioner seeks to obtain full payment of its administrative claim from respondent while other administrative creditors go unpaid. In essence, petitioner seeks to craft a priority for its administrative claim ahead of other administrative priorities. In this additional respect, petitioner's argument conflicts with the structure of the Bankruptcy Code.

Congress knew how to establish schedules of claim priorities. An extensive list of such priorities, designated from "First" to "Ninth," is set forth in § 507, and further implemented through the liquidation priority provisions of § 726 and the reorganization provisions requiring full payment of administrative claims under § 1129(a)(9) and specifying the priorities of other claims under § 1129(b). Congress also knew how to create "superpriority" administrative claims, which would come ahead of other administrative claims, as it did under § 507(b) for secured creditors whose adequate protection proved inadequate. Congress further knew how to create even higher priorities as needed for the estate to obtain postpetition credit, and authorized in § 364(c)(1) the awarding of administrative

claims with priority over those in § 507(b), as well as the grant of new liens or junior liens under § 364(c)(2) and (3) and even priming liens under § 364(d).

It is striking, therefore, that in the litany of all these statutory priorities, Congress nowhere set forth a priority status in bankruptcy for entities like petitioner which furnish services that allegedly benefit a secured creditor's collateral. Given the dominant role which creditor priorities play in bankruptcy – one of whose main goals is effecting creditor distributions – and Congress' explicitness in scheduling such priorities elsewhere in the Bankruptcy Code, petitioner's contention that such a priority was implicitly created by § 506(c), which by its terms is limited to trustees, strains all credibility. *Cf. United States v. Noland*, 517 U.S. 535 (1996) (refusing to imply claim priorities not expressly set forth by Congress).

In addition, petitioner's contentions would lead to absurd and contradictory results. Petitioner would doubtless agree that an action to surcharge collateral can be brought by the trustee, because that is exactly what the literal terms of the statute provide. If the trustee brings such an action, however, any recovery by the trustee would become property of the estate, and be used to pay claims in accordance with their statutory priority, on a *pro rata* basis within each priority class. See § 726(b) (requirement of payment of claims "pro

rata among claims of the kind specified in each such particular paragraph").[10] On the other hand, under petitioner's theory, petitioner can also bring a surcharge action, but if it does, it can retain any recovery for itself. See Petitioner's Brief at 43-46 (arguing that only petitioner has the incentive to pursue a claim for its own benefit). Why should the entity receiving the recovery depend on who brings the action? And what happens if *both* the trustee and petitioner seek to bring the § 506(c) claim – who should be allowed to pursue the action, and who should receive any resulting recovery? See, *e.g.*, *In re Bluffton Castings Corp.*, 224 B.R. 902 (N.D. Ind. 1998) (conflicting § 506(c) claims

[10] Petitioner (Brief at 45) argues that if the trustee pursues the § 506(c) claim, it must dedicate any recovery to the unpaid administrative expense creditor whose services gave rise to the right of surcharge. No statutory support is adduced for this proposition, and it is contrary to the express requirements for *pro rata* distribution contained in § 726(b). (Because §§ 943(b)(5), 1129(a)(9) and 1322(a)(2) each provide for payment in full of all administrative expenses, a surcharge claim by an administrative creditor will arise only where the estate is to be liquidated under chapter 7, in which event the distribution scheme of § 726(b) will come into play.) *Amici* American Insurance Association and National Union (Brief at 18-19) argue that administrative expenses are not subject to any rule of *pro rata* distribution. However, the cases they cite stand only for the proposition that once paid, administrative expenses other than legal fees should not be subject to a rule of disgorgement, but otherwise recognize the general rule, applicable to any unpaid administrative expenses, of *pro rata* distribution. *E.g.*, *In re Vernon Sand & Gravel, Inc.*, 109 B.R. 255, 257 (N.D. Ohio 1989).

filed by trustee and unsecured creditors; unsecured creditors denied standing). The fact that the statute provides no solution to these fundamental conceptual and practical difficulties is further evidence that petitioner's interpretation of § 506(c) cannot be sustained.[11]

[11] There is, of course, well-established precedent in bankruptcy that parties can be authorized to pursue actions belonging to the estate. This occurs, for example, when creditors committees or even individual creditors are authorized to pursue avoidance or other actions which, for whatever reason, the trustee is unwilling or unable to pursue. *E.g.*, *Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1362-63 (5th Cir. 1986) (creditors committee has standing to pursue preference action which trustee declined to pursue); *Canadian Pac. Forest Prods., Ltd. v. J.D. Irving, Ltd. (In re The Gibson Group, Inc.)*, 66 F.3d 1436 (6th Cir. 1995) (standing to individual creditor). In those instances, however, any recovery is not, as petitioner suggests here, for the benefit of the party pursuing the action, but for the benefit of the estate. *Coral Petroleum*, *supra*, 797 F.2d at 1363 (prosecution of preference claim for the protection of unsecured creditors' interests); *Gibson Group*, *supra*, 66 F.3d at 1438, 1446 (claims being pursued "that would benefit the estate if successful").

V. IF ADOPTED, THE RULE WHICH PETITIONER ADVOCATES WOULD ADVERSELY IMPACT THE BANKRUPTCY PROCESS AND DEBTORS' OPPORTUNITIES FOR REHABILITATION

One of the important goals of bankruptcy is to provide an opportunity for a debtor's reorganization. To accomplish that objective, secured creditors are required to forego exercising their rights of foreclosure so the debtor can try to rehabilitate. Frequently, secured creditors and debtors enter into consensual arrangements ("cash collateral orders") for postpetition use of the creditor's collateral under § 363, including provisions for adequate protection of the secured creditor's interests under § 363(e). (Such agreements may be accompanied by agreements for additional postpetition financing under § 364.) These cash collateral orders typically include provisions, similar to those included in the cash collateral order below, which provide that the collateral will not be subject to surcharge under § 506(c) without the secured creditor's consent. *Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 150 F.3d 868, 870 (8th Cir. 1998), *rev'd*, 177 F.3d 719 (8th Cir. 1999) (*en banc*). Through such consensual cash collateral arrangements, secured creditors are able to obtain some protection for their positions while debtors are given an opportunity to seek to reorganize and provide some recovery for their unsecured creditors and possibly shareholders.

The rule which petitioner advocates, however, would subject secured creditors to surcharge claims by any entity which provided postpetition goods and services to a debtor and remained unpaid, irrespective of the terms of any cash collateral order. Under petitioner's theory, and as the original panel decision held, because respondent agreed to the continued operation of the debtor's business, it is deemed to

agree "to accept the expenses and risks" associated with that continued operation. *Id.* at 872. Under such circumstances, secured creditors will be hesitant to accommodate debtors' requests that they defer foreclosure, lest they be tagged with the unpaid administrative costs of a failed reorganization. In many cases, as a consequence, secured creditors will not enter into agreed cash collateral orders, resulting in litigation as to the nonconsensual use of cash collateral, with attendant cost, delay, and disruption to debtors' businesses in the critical early stages of the case. In some percentage of those cases, moreover, the secured creditor will be granted relief from the stay, and the opportunity of the debtor to reorganize will be precluded. None of this is consistent with sound bankruptcy policy, but it will result from adoption of petitioner's position.

CONCLUSION

For all the foregoing reasons, the Commercial Finance Association prays that the *en banc* decision of the Eighth Circuit be affirmed.

Respectfully submitted,

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